87-1875

No. ____

IN THE

Supreme Court of the United States

October Term, 1987

OTIS L. LEE
Petitioner,
v.
THE ALBEMARLE COUNTY, VIRGINIA SCHOOL BOARD, et al.,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. Benjamin Dick, Esquire*
Law Offices of J. Benjamin Dick
421 Park Street
Suite #2
Charlottesville, Virginia 22901

*Counsel of Record

Attorney for Petitioner

QUESTIONS PRESENTED

1. IN THE LOWER DISTRICT COURT'S ORDER OF OCTOBER 29, 1986 GRANTING THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT, CAN A PUBLIC SCHOOL SYSTEM TAKE A TENURED TEACHER'S CONTINUING CONTRACT EMPLOYED FOR TWENTY-TWO YEARS IN VIOLATION OF THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION WITHOUT A TRIAL WHEN THE TENURED TEACHER ALLEGED IN HIS COMPLAINT THAT HIS FIRING WAS MOTIVATED BY PREJUDICE, HATRED, BIAS, AND HYSTERIA AND HE FURTHER ALLEGED HIS PROCEDURAL DUE PROCESS IN A STATE GRIEVANCE PROCEDURE WAS TAINTED PROVEN BY AFTER DISCOVERED EVIDENCE?

2. WAS THE DISTRICT COURT IN ERROR TO FIND THAT THE DEFENDANTS BELOW ENJOYED IMMUNITY IN THE DISMISSAL OF MR. LEE?

3. WAS THE DISTRICT COURT IN ERROR TO GRANT SUMMARY JUDGMENT ON MR. LEE'S CLAIM OF RACIAL DISCRIMINATION?

PARTIES

The parties to this action are Otis L. Lee, former teacher, principal and administrative assistant to the Superintendent of Schools, the Albemarle County of Virginia School Board, Superintendent Carlos Y. Gutierrez, School Board member Englar M. Feggans, Principal Carolyn S. Gaines, teacher Harriet L. Scott, administrative assistant Wilbert T. Lewis, Jr., Ella C. May, Christine N. Garrison, the Albemarle County Fact Finding Panel, the latter three being necessary parties.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

APPLICABLE VIRGINIA STATUTES

U. S. STATUTES AND CONSTITUTIONAL PROVISIONS

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

==========

The petitioner, Otis L. Lee, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered September 14, 1987, petition for rehearing and suggestion in banc denied February 17, 1988, and evolving from the judgment of the United States District Court for the Western District of Virginia at Charlottesville Virginia by Ordered entered October 29, 1986.

OPINIONS BELOW

Mr. Lee filed his Complaint in 1984 which was decided by Order granting a motion for summary to a second amended

complaint on October 29, 1986 (Appendix at page 10.) (Hereinafter App., pg.) A memorandum opinion dated October 29, 1986 supported the order. (App., pg. 12.) (The summary judgment motion of the original complaint was denied by Order of the District Court Dated January 1, 1985. (App., pg. 36.)

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court, decided September 14, 1987 by unpublished opinion. (App., pg. 3.) Mr. Lee's Petition to Rehear with suggest for rehearing en banc was denied by the Court's Order dated February 17, 1988. (App., pg. 1.)

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment 14

Section 1. Citizens of the United States. ... No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONGRESSIONAL STATUTES INVOLVED

42 U.S. CODE

§1981. Equal rights under the law.
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and

proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, Otis L. Lee, formerly a twenty-two year faithful school employee of the Albemarle County Virginia School System (Hereinafter "the School System") obtained tenure by his execution of a continuing contract with the School System and Albemarle School Board dated June 12, 1972 as a principal of McIntire Elementary School.

He was subsequently assigned in the 1982-83 school session to the Central Office as a special administrative assistant to the Superintendent for twelve months in his employment at a salary of $29,618.00 plus the employee's share of FICA, Virginia Supplemental Retirement and State Life Insurance costs for the school session 1982-83. Soon thereafter, he was dismissed from the School System after successfully

administering a Minority Task Force to hire and place black teachers. (Supra.)

In 1982, Superintendent Carlos Y. Gutierrez with the blessing of the School Board decided to hire for the 1982-83 school session solely all black teachers. He created on his authority and direction a Minority Task Force, a school committee of mostly black teacher employees. Naming Otis L. Lee as their Chairman, Superintendent Gutierrez testified in pre-trial depositions that Mr. Lee was the senior black administrator " ... [and] having some discussion with the Board for want of a better word, [Mr. Lee had] the right to operate in that position." (App., pg. 44.) The Superintendent testified in pre-trial depositions that the primary focus of his Task Force was to dispel "the

allegations ... that black teachers will not come to Albemarle County." (App., pg. 45.) The Task Force with Mr. Lee as Chairman recommended with the Superintendent to the School Board that all new 1982-83 teachers hired were to be black. (App., pg. 45.)

In so doing, the Superintendent had given Mr. Lee final authority to offer contracts to the qualified black applicants. In pre-trial depositions, the Superintendent testified that Mr. Lee had the "final authority" on proposing the black minority teachers to be hired by the School Board. (App., pg. 46.) Superintendent Gutierrez in the pre-trial depositions[1] testified that the Minority

---

[1] Hereinafter all testimony noted in this Petition is from pre-trial depositions taken of the defendants which on filing the district court chose not to open or consider deciding the case solely on the grievance panel record alone.

Task Force once in place was not popular politically or otherwise in the School System because in his opinion "there's a great amount of **latent racism** still in existence in our organization." (Emphasis added, App., pg. 46.) He also related in his deposition that inherent problems in the Task Force existed.

The Superintendent had "the feeling there were some professional jealousies or differences of opinion about that" toward Mr. Lee as chairman in such an important role. (App., pg. 47.) He also noted that he experienced "resistance" when placement began by Mr. Lee, himself, and personnel director Tom Hurlburt. (App., pg. 47.) Principals would call and say they preferred one person over another "and I'd say well I'm sorry, but that person is going

to be placed there. I would back the Task Force on its placement." (App., pg. 47.) He noted nonetheless the jealousies and complaints of the principals created a weakness in the plan of the Task Force. Mr. Lee, and the personnel director, Tom Hurlburt, were "besieged by complaints from principals." (App., pg. 48.) Mr. Lee, as chairman, and Mr. Hurlburt as personnel director took the brunt of the complaints.

Mr. Lee, as the chosen Chairman of the Task Force, nonetheless met no opposition from the School Board, but on being terminated post facto the hiring of his recommendations, the School Board determined in its reasoning to dismiss Mr. Lee from employment that Mr. Lee caused the so called "problems" and "endangered the success of the program". (Everyone of Mr. Lee's recommendations

were officially approved by the School Board at a duly constituted public hearing on May 10, 1982, Mr. Lee being fired by letter of the School Board dated June 29, 1983.) (App., pg. 39.)

The Task Force and Mr. Lee on May 10, 1982 as a matter of public record were publicly commended for doing an excellent job and the Task Force was thereafter disbanded. On July 12, 1982, Superintendent Gutierrez wrote and place in Mr. Lee's file a lavish letter of praise:

Dear Otis:

> As I complete my first year as Superintendent in the Albemarle County, I want to thank you for the support and assistance that you have given me in your role as Administrative Assistant to the Superintendent. Without question, the high point in the year for you and one of the very high points for me, has been the accomplishment of the goal of increasing the number of minority of professionals in our division and in beginning the task of balancing the distribution

> of minority professionals among our twenty-one buildings. **You deserve most of the credit for causing this goal to be accomplished**. I appreciate the work that you and the task force have done toward that end. (Emphasis added.)

In August of 1982, Mr. Lee's problems began. Information came to Superintendent Gutierrez about one of the black hirees, Mr. Holmes, an elected and fully qualified minority math teacher applicant, a math teacher approved of by the personnel director, Mr. Hurlburt and so approved by the School Board at its May 10, 1982 public meeting. Dr. Gutierrez testified in a pre-trial deposition that he received information Mr. Holmes was incompetent from School Board member James Walker.

> "Well, as I recall, Dr. Walker was outraged because he had supported the Minority Task Force and had believed what we had told him about going out and getting good people and when he heard this name, he just flew off the handle and let me have it with both barrels."

Ultimately, after considerable discussion, Dr. Gutierrez learned Mr. Holmes was accused of being an alleged homosexual. (Mr. Holmes would later categorically deny the same.) Thereupon Dr. Gutierrez ordered Mr. Lee that Mr. Holmes had to go. "I think I told him [Mr. Lee] I didn't want the man [Mr. Holmes] in the Division." (App., pgs. 44 - 51 see Testimony of Dr. Gutierrez regarding the people recommended to the Board and approved by the Board.)

Mr. Holmes at Mr. Lee's request, to avoid unwanted publicity that he deemed utterly false, tendered his resignation after being advised of Dr. Gutierrez's concerns and demands. Mr. Lee at the Superintendent's direction and because a School Board member complained, retrieved the contract from Mr. Holmes.

With other shifting and placement in the School System of teachers and Mr. Holmes resignation, a teacher vacancy developed at the B. F. Yancey School of which Mrs. Carolyn Gaines, a party defendant to this action, was the principal. Because Mr. Jenkins, a Minority Task Force hiree, requested transfer from Mrs. Gaines' school a vacancy had to be filled.

Unaided, Mr. Lee would have chosen Harriet Scott. Mrs. Gaines was at her request given an unaided opportunity to look at two teacher applicant folders. On return, Mrs. Gaines also chose Harriet Scott. Mr. Lee called Miss Scott at her home to announce to her an opening. Miss Scott immediately accepted the teaching post.

Miss Scott in so doing a week or so before the school was to open, asked

Mr. Lee if he knew where she could find an apartment in Charlottesville. He replied, being a property owner and having housed many a black teacher through his years of employment and assisting black teachers, a fact well known : "Harriet, I have an apartment if you want it. I'll be happy to show it to you when you get here and you can make the decision." (Lee Fact Finding Panel Testimony.) (App., pg.60.)

Harriet Scott, a 23 year old teacher, therafter soon arrived in Charlottesville on September 18, 1982, a Saturday and a non-school day with her mother and some relatives assisting her. On arriving she called Mr. Lee and asked to see the apartment that he had. He told her where to go and he met her at the apartment.

After inspecting with family members

the apartment offered to her, she alone signed a lease with Mr. Lee to rent the apartment and her mother made the security deposit. Mr. Lee informed her and her mother that the apartment had been newly painted, the painters hadn't cleaned up, and he would provide first of the week a cleaning, a stove and refrigerator. (Later confirmed in pre-trial depositions by all parties.)

Thereafter, on her first school day, Miss Scott, her principal (Carolyn Gaines), and others, including School Board member Mr. Feggans, went to Mr. Lee's rented apartment. Beforehand, Mr. Feggans and a Mr. Plotnick, a former political aide to a member of the Board of Supervisors and a former employee of the local newspaper, had called a housing inspector and a local news reporter to come to the apartment.

These individuals proceeded to demean the apartment and proffered to the reporter that Miss Scott had been pressured into the apartment.

From those orchestrated meetings, the local tabloid, The Daily Progress with a circulation in excess of 85,000 subscribers in the community, therafter printed a front page story on September 22, 1982 with the sensational headline: **"Teacher Felt Pressured To Rent."** The article included a selected picture of an unimproved kitchen area of the apartment (that Mr. Lee was in the process of delivering a new stove and refrigerator to) with the news caption "Teacher Rented House From School Official Sight Unseen." (App., pgs. 66-72.)

This was the beginning of a series of sensational local newspaper articles that eventually announced that Mr. Lee,

before he had the opportunity to respond by legal grievance proceedings, had been "DISMISSED". (App., pg. 66.)

Approximately two days after the first publication, Dr. Gutierrez testified in depositions on return from out of town that he spoke with the School Board Chairman Jessie Haden. "And she informed me of the [first] article and was I might say, hopping mad about the whole thing ... as I recall, she and I had words." He suggested to Mrs. Haden that the School Board members should stay out of it. Other School Board members nonetheless contacted Dr. Gutierrez who described them as "embarrassed that the school division would be called to the public attention through something like this."

By letter dated (Friday) September 24, 1982, approximately two days after

the first new story, the Superintendent suspended Mr. Lee from employment. He then went public again announcing his decision to the same reporter who had written the first article. This fact of a suspension was similarly reported in the September 25, 1982 issue of the local newspaper, with direct quotations emanating from the Superintendent and from the vice chairman of the School Board. The newspaper for October 6, 1982 carried the sensational headline: **"School Official Dismissed"**[2] over a story quoting the Superintendent as saying that "a dismissal action" against Mr. Lee has been taken. At this time, no state mandated grievance proceedings had even begun with Mr. Lee, the tenured contract employee. Only after the news articles under a letter dated October 22, 1982 did the

[2] (App., pg. 66.)

Superintendent first reduce to writing as required by state law addressed to Otis Lee announcing REASONS FOR DISMISSAL OF OTIS LEE. Pursuant to §22.1-309 of the Code of Virginia, as was his right, Mr. Lee with the first opportunity requested a hearing before a Fact Finding Panel, as provided in §22.1-312, Va. Code.

The Fact Finding Panel was thereafter emplaced and after adducing a massive volume of testimony from all corners of the School System, the Panel delivered its opinion. (App., pg. 36-37.) Its 2-1 recommendation (App., pg. 38.) concluded by two panel members, Mr. Landin and Miss Garrison, specifying that Mr. Lee's conducting of personal business on a regular basis during the course of his regular employment as assistant to the Superintendent constituted a conflict were "actions

[for] ground for dismissal." (App., pg. 38.)

The dissent, Miss May, panel member, was joined by the other two unanimously agreeing that Lee's personal business activities were conducted during working hours, occurred over a period of time, were not concealed by Otis Lee, were a greater or lesser degree known to officials in the School System and were not specifically addressed as they occurred. (App., pg. 38.)

She "as the remaining member" felt while those actions were improper, they did not warrant dismissal. She opined that in that such actions were not addressed as they occurred while to a greater or lesser degree they were known to all, that Lee be suspended for 90 days without pay and in that time effectuate his retirement.

Shortly thereafter without further notice to Mr. Lee, on June 29, 1983, the School Board accepted the two panel members' recommendation to dismiss and dismissed Mr. Lee. (App., pgs. 39-40.) Summarizing their decision, the firing was based on Mr. Lee intermixing his private business affairs and public responsibilities 1) "to the serious detriment of the School System" and 2) that Mr. Lee "improperly hired and placed at least one teacher (unidentified) in his position as Chairman of the Special Task Force for Minority Hiring which greatly endangered the success of that program." (App., pg. 39.)

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

Mr. Lee subsequently filed his federal complaint in the United States District Court for the Western District of Virginia alleging violations of his

Fourteenth Amendment rights to substantive due process and abridgements of his rights, privileges, and immunities under 42 U.S.C. §1981 and §1983. He also alleged a conspiracy under 42 U.S.C. §1985.

First denying the defendants motion for summary judgment on the original complaint, the District Court requesting new counsel to make concise the original complaint, a first and second amended complaint were filed alleging the same claims inclusive of the deprivation and taking of Mr. Lee's tenured continuing contract under the colour of state law and on the basis of extreme bias, bad faith, hysteria, inflammatory news articles made <u>prior</u> to emplacement of any meaningful and non-tained employer / employee grievance process. The effect was a pre-disposed School System's,

School Board's and the community's pre-judgment adverse to Mr. Lee's good name in his community thus depriving him of his liberty.

REASONS FOR GRANTING THE WRIT

ONE

Without the intervention of this highest Court in the land, the firing of Mr. Otis Lee, tenured contract teacher, in violation of the substantive due process clause of the Fourteenth Amendment of the Constitution stands without redress and the deprivation was obtained by the wrongful granting of summary judgment depriving Mr. Lee of his day in Court by trial. The result is a grave injustice and precedent offensive to the Constitution and Rights, Privileges, and Immunities guaranteed to all citizens. Mr. Lee seeks reversal and a remand of the case for trial.

The tainted, biased, hysterical, and unlawful firing of Mr. Lee can readily be seen in massive pre-trial depositions[3] obtained on filing his Complaint to regain his good name in his community, his job and or damages for the deprivation

[3] The same were never opened or considered. See Supra.

of the same in violation of the United States Constitution. By the District Court's granting of summary judgment, affirmed by the U. S. Fourth Circuit, Mr. Lee's right to prove the same in an adversary evidentiary hearing will be forever taken from him and he will have lost a long time earned property for impermissible constitutional reasons unless this Court intervenes.

A pre-trial deposition deponent, James Uttley, illustrates graphically the situation. Cleaning as a janitor in the basement of the apartment house of the apartment that newly hired teacher Harriet Scott had agreed to rent from Mr. Lee, Mr. Uttley overheard several people, purportedly on the day a School Board member (defendant Mr. Feggans) and school principal (defendant Mrs. Gaines) had caused a news reporter to

come to meet them at the apartment and he heard one of them say:

> "We're going to get that son of a bitch. We're going to get his job and get his money. We've got the son of a bitch now." (Pre-Trial Deposition of James Uttley, September 18, 1984.)

The growing and existing sentiment against Mr. Lee because of the jealousies and dislikes which arose against him while successfully performing as Chairman of the Minority Task Force are rampantly illustrated throughout the pre-trial depositions. The District Court gave the same no moment reasoning it had no obligation to do so if the Court could find sufficient evidence for dismissal under Virginia Code §22.1-307 to support a state statutory reason for dismissal.

With the sensational newspaper articles (App., pg. 66.) prompted by

a School Superintendent hounded by the press and arising out of School Board members bending his ears, Dr. Gutierrez's pronouncements and briefings nearly daily gained front page and front local news page coverage with sensational headlines as well before Mr. Lee was ever afforded his procedural rights of a state mandated grievance hearing, viz., for example, "Teach Felt Pressured To Rent House". (The Daily Progress, September 22, 1982); "School Official Probed On Conflict Of Interest". (The Daily Progress, September 24, 1982; "School Official Dismissed". (The Daily Progress, October 6, 1982.) In the September 24, 1982 article, the same reporter wrote quoting Superintendent Gutierrez:

> "Albemarle County School Superintendent Carlos Gutierrez said today that he is investigating Otis

L. Lee, his administrative assistant, for a possible conflict of interest violation and misuse of public trust." (The Daily Progress is the largest daily newspaper in the area with over 85,000.00 subscribers.) (App., pgs. 66-72.)

Before Mr. Lee officially received reasons for his suspension as required by Virginia law, the same reporter reported in the September 24, 1982 **"School Official Dismissed"** article, with a photograph of Mr. Lee, quoting the Superintendent again:

> Gutierrez said that several angles are being investigated. "There is the aspect of conflict of interest, doing business with an employee. There is the allegation that a public officer implied that there was a connection between a teaching job and renting an apartment. And there are other angles," he said. "I'm not just going to sweep this under the rug. I take the allegations very, very seriously. I'm conducting an intensive investigation, and I do intend to act very, very shortly."

The Fourth Circuit general rule in School Board / Teacher disputes when

it comes to a dismissal and a procedural mechanism such as a grievance panel is emplaced to guarantee procedural due process, that on being granted the grievance process, a teacher is not entitled to a de novo hearing if the School Board in its broad discretion can support with sufficient evidence a statutory authorized reason for dismissal. Johnson v. Branch, 364, F.2d 177 (4th Cir. 1966); in accord, Gwathmey v. Atkinson, 447 F. Supp. 1113 (E. D. Va. 1976).

In reliance on Johnson v. Branch, the District Court adopted the Fourth Circuit rule that the Court "may not usurp the discretionary power of the school board but must judge the constitutionality of its action on the basis of the facts which were before the Board and on its logic." Citing

Johnson v. Branch, Id., at page 181 (4th Cir. 1966). Stating it thus had a very limited review exercise, the District Court relied on Gwathmey v. Atkinson, 447 F. Supp. 1113, at 1117, (1976) that a de novo entitlement by the District Court wasn't available and "If this Court were required to look beyond the purported reasons for the School Board's action, then again, perhaps, there would be issues of fact remaining. But neither is this required of us under the scrutiny appropriate herein."

The District Court concluded under Wood v. Strickland, 420 U.S. 308 (1975), "all the plaintiff has standing to ask of the Court here is to determine whether there was [any] evidence before the School Board supporting its decision." Believing it could find the same, the

District Court granted summary judgment and did not even bother to open and consider the evidence gathered in pre-trial discovery pursuant to Mr. Lee's Complaint. Much of his discovery could be classed as after discovered evidence inclusive of but not limited to factual evidence of hatred and bias toward Mr. Lee within the School System, that latent racism was still present in the School System, and that allegations of a tainted grievance panel existed.

Virginia Code §22.1-307 (App., pg. 61 .) lists when teachers may be dismissed under Virginia law, viz., incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, conviction of a felony or a crime of moral turpitude, "or other just cause". Mr. Lee's dismissal was

not supported by any of the specific enumerated reasons as none could be found or supported.

However, the District Court underlined the latter language ("or other just cause") and seized upon this ambiguous terminology as fitting the sufficient evidence the School Board advanced as grounds for dismissal that it "acted well within the limits of its discretion and had ample evidentiary support for its action" citing their reason that Mr. Lee intermixed his private business affairs and his public responsibilities to the serious detriment of the School System and Mr. Lee improperly hired and placed at least one teacher in his position. Those two reasons given by the School Board, by the evidence of pre-trial depositions, are totally contradicted, suspect,

possibly unlawful and sufficiently controverted to make the granting of summary judgment in this cause, when weighed under all the circumstances, a manifest injustice.

First, Mr. Lee was never given notice that his outside of school business activity in which he had engaged for years, which outside school jobs Dr. Gutierrez testified was common among no less than 65% of his teachers, would ever cause him to be dismissed without first bringing some enacted school policy or notice that the same was a dismissable offense to a tenured continuing contract employee with vested rights. Mr. Lee's affidavit filed in opposition to the motion for summary judgment stated that any number of school officials had outside property interests and attended to them during school hours on a free moment,

a fact well known throughout his employment. (App., pg. 53 .)

The School Board in its reason given never identified how Mr. Lee's outside activity was a "serious detriment" to the School System when many others were doing outside activities during school hours including former Superintendents. His dealings with Harriet Scott seeking an apartment on a short notice on a non-school day that saw her after a long inspection with her mother lease a nice apartment in a nice neighborhood can only be the surmised "serious detriment" since it was not given and in pre-trial depositions, Harriet Scott testified that Mrs. Gaines had pushed complaints and that she really didn't know what was going on. (See Apartment, App., pg. 68)

Regardless, as the panel noted

unanimously, to a greater or lesser degree, all of Mr. Lee's activities (which he swore were very limited during school hours) were widely known, condoned and never addressed nor ever concealed to the School System. (Emphasis added.) Over a period of 23 years, he had wisely invested in properties and was well known for his business enterprises in real estate outside of school. He had in helping to integrate the Albemarle County School System following Virginia's "massive resistance" campaign put up many a black teacher and rented to them as well since he could provide affordable housing. (This was true in 1982.)

It was solely the Harriet Scott rental and sensational news stories planted largely by school employees and the Superintendent before Mr. Lee was ever afforded the dignity and privacy

of a grievance process, that one could surmise created "serious detriment" to the School System, however, it was totally created by the School System's employees fueled by jealousy and an over zealous press crooning to a cooperative and pressured Superintendent giving nearly daily briefings on the war against Mr. Lee.

In Perry v. Sinderman, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699 33 L. Ed. 2d 570 (1971), this Court has held that a continuing contract of employment is a "property interest". It can only be deprived for good cause. The Fourth Circuit has so agreed. Wooten v. Clifton Forge School Board, 655 F.2d 552, at 554, citing Perry v. Sinderman.

In Wooten, the Fourth Circuit reasoned that the mere assignment of a teacher was a deprivation of property

interest, viz., that one's liberty interest in his reputation would be seriously damaged on being discharged and his charges are publicly disclosed, citing as authority, Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972). Yet, It turns a deaf ear to Mr. Lee's claims and right to a trial on disputed facts by affirming summary judgment in violation of its prior rulings on summary judgment. Summary judgment "should be granted only where it is perfectly clear that no issue of fact is controverted." West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983), citing Stevens v. Howard D. Johnson Co., 181 F.2d 390 at 394 (4th Cir. 1950)

Before Mr. Lee was ever formally charged or was allowed the privacy and dignity of a formal grievance panel

hearing within the School System, he was the victim of a local witch-hunt through the press and throughout the School System. A massive travesty of unfounded news leaks, untested innuendos, blatant character assassination, and malicious destruction of his basic rights of liberty and personal and professional reputation promoted by those within the School System within their sanctuary and without proceeded unabated. He was vilified and portrayed publicly as a despicable public servant violating "the public trust" (The Daily Progress, September 24, 1982, App., pg. 71.) and finally before he even began his defense legally and officially before a grievance panel, to his community with the photograph blazened on the paper, it was publicly announced "School Official Dismissed". (The Daily Progress, October

6, 1982.) (App., pg. 66.)

Therefore, to overcome the School Board's statutory reason seized by the District Court of "good and just cause" to dismiss Mr. Lee, the School Board would have to overcome an evidentiary proof that the firing was motivated by an arbitrary or capricious reasoning wholly unsupported by fact and, as the Sixth Circuit has held consistent with this Court's ruling, to overcome "that the decision was motivated by bad faith or ill will", a trial is necessary. Stevens v. Hunt, 646 F.2d 1168, 1178 (1981). This Court, in accord, has held that liberty interest under the Fourteenth Amendment are subject to the protections of due process "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."

Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Mr. Lee has been deprived of his right to fairness guaranteed by the substantive due process clause.

Even in Gwathmey v. Atkinson, 447 F. Supp. 1113, at 1117 (1976) cited by the District Court, that Fourth Circuit District Court wrote in its opinion concerning the School Board's discretion, "Discretion, however, means exercise of judgment, not bias or capriciousness." The First Circuit noted in Drown v. Portsmouth School District, 435 F.2d 1182, 1187 (1971), that "bad faith may rise to a constitutional level in which case the federal courts are available."

This Court has held to meet the requirement of substantive due process that decision makers may not act in a manner which is "wholly arbitrary

or irrational." Martinez v. California, 444 U.S. 227, 282 100 S. Ct. 553, 557 (1980). In Martinez, this Court noted "The touchstone of due process is protection of the individual against arbitrary action of government." Citing Dent v. West. Va., 129 U.S. 114, 123, 9 S. Ct. 223 (1889).

To illustrate for purposes of this petition that Mr. Lee is entitled to vindication of his reputation and restoration of his substantive due process right, the following is true.

Miss Ella May, one grievance panel member, reveals in pre-trial deposition testimony the probability the grievance panel process was tainted ab initio. (App., pgs. 41-43.) Miss May intimated that panel member Mrs. Garrison voted against Mr. Lee solely because her job depended on her doing so.

> (Miss May on Direct)
> [T]his was Mrs. Garrison. David [David Landin, Panel Chairman], you've got to help me, my job is riding on this - in other words, what it was saying was that, my job is related to this.

Miss May, a tenured teacher of long standing went on to say "I didn't think the decision was a fair one." She revealed Mrs. Garrison played tennis with Mr. Landin's wife and up to the final vote, Mr. Landin was siding with Miss May.

> (Miss May on Direct)
> "Because he had voted the same thing I had voted all the way through ... Mrs. Garrison asked him ... can you agree with that ... So since there was no change, I assumed that the final draft would be like all the rest had been on the issue, but it had been changed. And so many things had been changed, until it kind of upset me.

Mrs. Garrison, visiting many of the schools within the division, revealed in her pre-trial deposition (App., pg.

43.) that within the School System before her appointment to the panel by Superintendent Gutierrez, the atmosphere toward Mr. Lee due to the "notoriety" of Lee's newspaper articles within the school was distressful.

> "I mean people were distressed by just the notoriety and the - and having things in the paper. What do you think about it; what do you know from central office ... I just know basically what we all know from the paper."

Asked if a lot of the school employees were upset with the "notoriety of it", she responded, "I think anybody would be." Superintendent Gutierrez in selecting her to be a panel member, took her to his office alone and privately and told her in an apparent bravado and patriotic tone that she was selected as the Albemarle County School System's representative. Mrs. Garrison testified she was brand new in the system.

Not only was the "notoriety" of the newspaper articles poisoning the waters of the fairness, impartiality, non-emotional mandate of a grievance hearing, Mr. Lee had to contend with past "jealousies or differences of opinion" and "resistance" by the school employees for his role as Chairman of the Minority Task Force. (App., pg. 47.) Even though Mr. Lee and his Superintendent, who had praised him lavishly for a job well done, were together when the Minority Task Force made its recommendations (App., pg. 48.) to the School Board approved May 10, 1982 in a public hearing, once the newspaper articles came out, Board members including Mrs. Haden, Chairperson, were "hopping made about the whole thing." (App., pg. 50.) The School Board, "embarrassed" by the sensational news,

on June 26, 1983 in their letter dismissal having commended Mr. Lee's Minority Task Force as a job well done, the Superintendent having heaped lavish praise upon him, cited errors post facto that "endangered the success of the Minority Task Force's program"; Mr. Lee had improperly hired or misplaced at least one black teacher, totally contradicting their May 10, 1982 public hearing approval, the praise and commendation, and adding insult to injury, the School Board never identified who was the at least one teacher he improperly hired or misplaced.

Looking at the grievance panel's opinion (App., pg. 36.), no where do they conclude Mr. Lee improperly hired or misplaced a teacher nor that be "endangered" the program, citing a complaint to his independent judgment

which he had been given, viz., the final authority to offer contracts. Their majority recommendation to dismiss rested "unanimously" on his outside personal business conducted on a regular basis "to a lesser or greater degree" known by the School System.

In the Eighth Circuit in the case of Fisher v. Snyder, 476 F.2d 375 (1973), a teacher's contract was terminated because of accusations that she was having overnight guests providing for an inference of sexual misconduct. She was fired to maintain the integrity of the public school system. The Eighth Circuit ruled her firing was constitutionally impermissible and violative of the substantive due process clause under the Fourteenth Amendment. In making the decision, the Eighth Circuit noted Mrs. Fisher, who was afforded

a grievance hearing just as Mr. Lee had and had not concealed her boarders, nonetheless, the given reasons by the School Board and Superintendent to dismiss her were deemed to be arbitrary and capricious.

It is the simplest principle of due process, substantive due process, that a "fair trial in a fair tribunal is a basic requirement of due process." In Re Murchinson, 349 U.S. 133, 136, 99 L. Ed. 1942 (1955). No less a standard applies to the grievance panel and the School Board.

Mr. Lee's dismissal was a prejudicial and biased decision. For the reasons and law stated above, a writ to review should be granted.

TWO

In granting the Writ, to remand for trial should include a decision reversing the decision below that immunity applies in the instant case.

Immunity is not applicable under the Eleventh Amendment where allegations and proof of bad faith exist. In addition, a suit by a citizen of one state against another state in the Courts of the United States is prohibited by the plain text of the Eleventh Amendment to the constitution. In Beers v Arkansas, 61 U.S. 527, 15 L.Ed. 99, 992 (1858), Chief Justice Taney wrote:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state."

Despite the Eleventh Amendment, a state

may be sued by its own consent. Hans v. Louisiana, 134 U.S. 1, 22 L.Ed. 842, 10 S.Ct. 504 (1980).

By Virginia Code Section 22.1-71, Virginia has clearly waived such privilege, as against this action stemming from breach of contract, by declaring the defendant School Board to be "a body corporate ... vested with all the powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law and [which] may sue, be sued, contract, be contracted with" etc. The holding in Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960), that this statute does not affect the School Board's governmental immunity for tortuous personal injury, emphasizes the clear waiver of immunity from suit arising from contract.

In Pennhurst State School & Hospital

v. Halderman, ____ U.S. ____ 97 L.Ed.2d 67 (1984), the United States Supreme Court held only that a federal court may not award injunctive relief against state officials on the basis of state law. In Fitzpatrick v. Bitzer, 427 U.S. 445, 49 L.Ed.2d 614, 96 S.Ct. 2666, the Court puts in perspective the Fourteenth Amendment and the "appropriate legislation" for its enforcement and their effect upon the Eleventh Amendment and the principles of state sovereignty, viz:

> "we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890), are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate Legislations" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.

As to the Eleventh Amendment immunity argument, the controlling issue is "good faith". Plaintiff has alleged "bad faith" among other charges leveled against the defendants and the School Board. This being an evidentiary issue on disputes of fact, a motion for summary judgment cannot be granted.

The Supreme Court of the United States has indicated that dismissal in a §1983 action is not to be granted unless "it appears beyond doubt that the plaintiff cannot prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519 (1972), reh. den. 405 U.S. 948. In accord, Edwards v. Duncan, 335 F.2d 993 (4th Cir. 1966). The plaintiff as a matter of law has met that burden. The Supreme Court

has held that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff need not even allege bad faith in order to state a claim for relief. Monell v. Department of Social Services, 436 U.S. 658. As in all actions brought under §1983, the plaintiff must allege only that some person has deprived him of a federal right, and that person acted under colour of state law. Gomez v. Toledo, 446 U.S. 635 (1980). Clearly, Mr. Lee has adequately accomplished these requirements in his Complaint.

Finally, immunity and the Eleventh Amendment do not apply to the instant cause as the defendants have been sued in their official and individual capacities. Brandon v. Holt, 469 ____ U.S. ----, 83, L.Ed.2d 878, (Opinion

§83-1622, decided January 21, 1985 involving 42 U.S.C. §1983). See also and the Court citing Owen v. City of Independence, 445 U.S. 622, 63 L.2d 673, 100 S.Ct. 1398 (1980). Not even qualified immunity applies even where it involves "good faith". Id. L.Ed. at page 886. Moreover, the plaintiff has not only alleged "bad faith", but that his firing was motivated by malice and hatred. And for these reasons, a writ should be granted.

THREE

To decide whether summary judgment was proper in this case on a racial discrimination claim when a prima facie case was alleged in the Complaint.

The decision of Moore v. City of Charlotte, N.C., 754 F.2d 110 (4th Cir. 1985) is supportive of Lee's discrimination complaint and by the

criteria set forth in that case, the decision in this case is in conflict with this prior decision although the Fourth Circuit opined Mr. Lee had not met the criteria of this case.

The Fourth Circuit Panel set forth in Moore that "The purpose of the prima facie requirement is therefore served and the requirement met upon a showing (1) that plaintiff engaged in prohibited conduct similar to that of a person of another race, color, etc ... (2) that disciplinary measures enforce against the plaintiff were more severe than those enforced against the other person."

In the first instance, Moore was allowed to go to trial, Lee has been denied a trial. In the second instance, by the criteria of Moore, Lee has amply set forth a prima facie case and material facts have been overlooked.

In his Complaint, Lee pleaded unequivocally as follows:

> ¶27. Plaintiff believes and alleges that no caucasian employee has been tried or dismissed for reasons similar to those for which plaintiff was dismissed although in recent history or the school system, there have been Caucasian employee who openly engaged in forbidden or unforbidden activities and yet were not similarly scorned or treated in the manner that plaintiff was treated; and plaintiff believes and alleges that he was dismissed solely because of his race.

In support of his pleading, Lee obtained pre-trial deposition testimony and affidavits in support of his claim. The Superintendent who dismissed Lee disclosed in pre-trial deposition the School System still had latent racism within it which was confirmed by the pre-trial deposition of Howard A. Collins, the School System's Director of Vocational Education. He was specifically asked if he agreed with Dr. Gutierrez's

assessment and he responded "yes".

To dismiss Lee's case brought pursuant to §§ 1981, 1983, and 1985 places this decision in clear conflict with Moore v. City of Charlotte, N.C., 754 F.2d 1110 (4th Cir. 1985). Mr. Lee's record is replete with demonstrations of controverted facts that go to the issue of discrimination and motivations for his dismissal.

In the Fifth Circuit, a trial court improperly dismissed a black professor's suit in which he alleged that the failure of the university's president to provide him with responsibilities commensurate with his title and his later demotion to a teaching position were caused by racial animus where the record demonstrated that genuine issues of fact existed with respect to the quality of the plaintiff's performance as Dean

of University Relations, the motivation of university officials in assigning responsibilities and salary to the plaintiff, and the reasons of university officials for their decision to terminate the plaintiff's tenure as dean. John v. State of Louisiana (Bd. of Trustees for State Colleges and Universities) (C.A. 5, La. 1985), 757 F.2d 698.

Mr. Lee was dismissed for purportedly endangering a program for which he was lavishly praised and commended by the Board and Superintendent alike. Their motivations could only be suspect by that blatant contradiction.

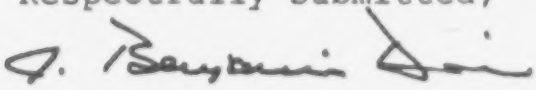
For the reasons stated above, a writ should be granted.

CONCLUSION

The bias, arbitrary, capricious decision of the School Board should

be subject to a trial on the merits as well as Mr. Lee's discrimination claim. The decision of the Fourth Circuit Panel overlooks material facts and is in conflict with the case law of this Circuit and the United States Supreme Court.

Respectfully Submitted,



J. BENJAMIN DICK
Counsel of Record
421 Park St.-Suite 2
Charlottesville,VA
22901
(804) 977-6607

87-1875

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

OTIS L. LEE
Petitioner,
v.
THE ALBEMARLE COUNTY, VIRGINIA SCHOOL BOARD, et al.,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (APPENDIX)

J. Benjamin Dick, Esquire*
Law Offices of J. Benjamin Dick
421 Park Street
Suite #2
Charlottesville, Virginia 22901

*Counsel of Record

Attorney for Petitioner

INDEX TO TABLE OF CONTENTS

OF APPENDIX

TABLE OF CONTENTS

APPENDIX A - ORDERS AND OPINIONS OF COURT'S BELOW — Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2182

Otis L. Lee,
Plaintiff - Appellant,

v.

Albemarle County School
Board, et al.,
Defendants - Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the position for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing

in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Russell and Judge Widener.

For the Court

JOHN M. GREACEN
CLERK

United States Court of Appeals
For the Fourth Circuit
Unpublished
No. 86-2182

Otis L. Lee,
Plaintiff - Appellant

versus

Albemarle County School Board; Carlos Y. Gutierrez, Englar M. Feggans; Carolyn S. Gaines; Harriet L. Scott; Wilbert T. Lewis, Jr., Ella C. May, Christine N. Garrison; the Albemarle County Fact-Finding Panel and Members, Necessary Parties,
Defendants - Appellees

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (CA-84-0038-C)

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (CA-84-0038-C)

Argued: July 7, 1987
Decided: September 14, 1987

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

J. Benjamin Dick (S. W. Tucker; Hill, Tucker & Marsh on brief) for Appellant; Douglas Leigh Guynn (Wharton, Aldhizer & Weaver; George R. St. John; St. John, Bowling, Payne & Lawrence; J. Randolph Parker; Tucker & Parker on brief) for Appellees.

PER CURIAM:

Otis L. Lee, a black male and a former administrative assistant to the Superintendent of the Albemarle County School Board ("the Board"), appeals an order of the district court granting summary judgment in favor of all defendants in his civil action brought pursuant to 42 U.S.C. §§ 1981, 1983 and 1985. Lee alleged that his discharge by the Board was improper and racially motivated. The district court concluded that there was no evidence of racial animus in the action taken against Lee. We affirm.

Prior to his discharge, Lee acted as chairman of the Board's Minority Task Force, which was responsible for recruiting minority applicants for teaching positions in the Albemarle County public schools. On September 22, 1982, a story appeared in a local newspaper asserting that Lee had used his position to pressure a newly-hired minority teacher into renting an apartment in a building that he owned. Following the newspaper report, Carlos Gutierrez, the Superintendent of Albemarle County Schools suspended Lee pending an investigation of the incident mentioned in the newspaper account as well as certain other allegations that Lee had abused his public position.

Following a preliminary investigation, Superintendent Gutierrez concluded that the charges against Lee had merit and recommended his dismissal

to the Board. Lee then elected a hearing before a three-person fact-finding panel as provided by Virginia Code §22-1-310. A panel was selected and four days of hearings were conducted in January and February, 1983. Lee was represented by counsel throughout the hearings.

At the conclusion of the hearings, the panel found, inter alia, that

> Otis Lee conducted personal business on a regular basis during the course of his employment as Administrative Assistant to the Superintendent of the Albemarle County School Division which constituted a conflict with his official duties.

The panel further concluded that Lee's actions constituted grounds for dismissal under Virginia law.[1] After a review

---

[1] Educational personnel may be dismissed in Virginia for any "good or just cause." Va. Code § 22.1-307.

of the panel's findings and a transcript of the hearings, the Board voted by a vote of six to zero to discharge Lee.

Lee subsequently filed a civil action alleging that he had been dismissed in violation of his constitutional rights to procedural and substantive due process, that his discharge was racially motivated, and that Superintendent Gutierrez had conspired with members of the Board to deprive him of his civil rights. Named as defendants were the Albemarle County School Board and seven of its members individually, the fact-finding panel and all three of its members individually, Superintendent Gutierrez, and three employees of the Board who witnessed the incident described in the September 22, 1982 newspaper story.

On October 29, 1986, the district court granted summary judgment in favor of the defendants on all claims advanced

by Lee. The court concluded that the Board had established a legitimate justification for dismissing Lee and had accorded him a a full and fair opportunity to be heard on the charges against him. The court also held that Lee's complaint of racial discrimination amounted to nothing more than a "bare allegation" without evidentiary support.

On appeal, Lee contends that there is a material question of fact concerning whether the Board conducted an impermissible second hearing on his pending discharge which he was not permitted to attend. Lee also argues that he established a prima facie case of racial discrimination in the Albemarle School system that precludes summary judgment on his §§ 1981, 1983 and 1985 claims.

Upon consideration of the record, briefs, and oral argument, we conclude

that appellant's contentions are utterly without merit.[2] Accordingly, we affirm the grant of summary judgment in this matter for the reasons expressed by the district court. Otis L. Lee v. The Albemarle School Board, et al, C/A No. 84-0038-C (W.D. Va. October 29, 1986).

AFFIRMED

---

[2] The record clearly discloses that the Board merely reviewed the extensive transcript of the fact-finding panel's hearings. There is no indication that a second hearing was conducted.

Appellant's effort to assert a prima facie case of discrimination based upon his replacement as administrative assistant by a Caudasian is also flawed. His complaint alleged discriminatory discipline. In such cases, a prima facie case requires the plaintiff to show that the disciplinary measures imposed against him were more severe than those enforced against a member of the non-protected class engaged in similar conduct. Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir.), cert. denied, _____ U.S. _____, 105 S.Ct. 3489 (1985). There is no evidenice in the record to support a prima facie case of discrimination under that standard.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Otis L. Lee,
Plaintiff

v. CIVIL ACTION
84-0038-C

The Albemarle County School
Board, et al.,
Defendants

O R D E R

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. Defendants' motion for summary judgment shall be, and it hereby is, granted.

2. This case shall be, and it hereby is, dismissed and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order,

and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: JAMES H. MICHAEL, JR.
JUDGE

DATE: OCTOBER 29, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Otis L. Lee,
Plaintiff

v. CIVIL ACTION NO.
84-0038-C

The Albemarle County
School Board, et al.,
Defendants

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

Following his dismissal from his post as administrative assistant to the superintendant of the Albemarle County public schools, plaintiff filed this action under 42 U.S.C. §§ 1981 and 1983, alleging violations of his rights to due process of law and equal protection of the laws. He also charged certain defendants with conspiring to deprive him of his civil rights. This matter is now before the court on defendants' motion to dismiss under

Rule 12 (b) (6) of the Federal Rules of Civil Procedure. The parties have submitted materials outside the pleadings to support their positions, and having accepted and considered this material, the court must convert the motion to dismiss into a summary judgment motion. Accordingly, the court has analyzed the case to determine whether there is any qenuine issue of material fact outstanding. Finding none, the court grants summary judgment in favor of the defendants.

I. Background

The plaintiff, Otis Lee, is a black man who was employed by the Albemarle County School Board from 1960 until his dismissal on June 29, 1983. Mr. Lee worked first as a teacher, then as a principal, and finally in 1981 was appointed administrative assistant to the superintendent of schools. In

this position he served as chairman of the Minority Task Force, which was responsible for recruiting minority applicants for teaching positions in the Albemarle County public schools. In addition to his job with the school board, Mr. Lee owned and managed several rental properties in the city of Charlottesville.

On September 22, 1982, a story appeared in the Charlottesville Daily Progress reporting that Harriette L. Scott, a newly hired black teacher, had felt pressured to rent an apartment from Mr. Lee, fearing that she would jeopardize her job it she refused to rent the apartment. Shortly afterward, Mr. Lee was suspended from his position by Superintendent Gutierrez pending an investigation into allegations that Lee had intertwined his private business affairs with his public duties for private

gain; that he used public facilities, including secretarial time and a county vehicle, for private gain; that he had conducted his private business affairs on school time; that he had improperly carried out his duties as chairman of the Minority Task Force; and that he had misrepresented the authority of his office. Based on these charges and an additional charge of lying, Superintendent Gutierrez recommended in October 1982 that the school board dismiss Lee. Lee elected a hearing before a fact-finding panel under Virginia Code §22.1-310. The panel was selected pursuant to Virginia Code §22.1-312 and held four days of hearings during January and February of 1983. Following the hearings, the fact-finding panel made the following findings of fact and recommendations:

Based on the evidence when considered as a whole, a majority of the panel finds as a fact that:

While the Minority Task Force was generally successful, Otis Lee exercised independent judgment as chairman of the Minority Task Force which was inconsistent with the proper functioning of the task force and its goals.

Based on the evidence when considered as a whole, the panel unanimously finds as facts that:

1. Otis Lee conducted personal business on a regular basis during the course of his employement as Administrative Assistant to the Superintendent of the Albemarle County School Division which constituted a conflict with his official duties.

2. The personal business acitivities which were conducted during working hours occurred over a period of time, were not concealed by Otis Lee, were to a greater or lesser degree known to officials in the Albemarle County School Division and were not specifically addressed as they occurred.

...

A majority of the panel finds that these actions are grounds for dismissal under the law. The remaining member of the panel feels that certain of Mr. Lee's actions were improper but not sufficient to warrant dismissal and since the actions developed and occured over a period of time, were to a greater or less degree known

to officials in the Albemarle County School Division and were not specifically addressed as they occurred, recommends that Otis Lee be suspended for 90 days without pay and that during these 90 days Otis Lee effectuate his retirement.

On June 28, 1983, the Albemarle County School Board passed the following motion by vote of six to zero:

> Having read the complete transcript of the fact-finding hearing in the Otis L. Lee grievance procedure, and having considered the recommendations of the fact-finding panel, the board has determined:
>
> -That Mr. Lee did intermix his private business affairs and his public responsibilities to the serious detriment of the school system, and
>
> -That Mr. Lee did improperly hire and place at least one teacher in his position as Chairman of the Special Task Force for Minority Hiring which greatly endangered the success of that program.
>
> The board accepts the recommendation of the majority of the fact-finding panel and does hereby dismiss Mr. Lee.

On June 11, 1984, Mr. Lee filed this suit under 42 U.S.C. §§ 1981 and 1983. By order entered by this court

on January 11, 1985, the plaintiff was given leave to file an amended complaint. The amended complaint was filed on February 28, 1985, and the defendants filed a motion to dismiss. Prior to the court's ruling on the motion to dismiss, plaintiff sought once again to amend his complaint. By order entered by this court on July 23, 1985, the plaintiff was given leave to file a second amended complaint. The defendants again filed a motion to dismiss, which is now before the court as a motion for summary judgment.

Plaintiff names as defendants the Albemarle County School Board and seven of its members individually, the fact-finding panel and all three of its members individually, Superintendent Gutierrez, and school board employees Lewis, Gaines, and Scott. He alleges that the fact-finding panel and the

school board deprived him of his constitutional right to due process and equal protection of the law. Plaintiff also alleges that Superintendent Gutierrez, Board member Feggans, Lewis, Gaines, and Scott conspired to deprive him of his civil rights. In addition, he asks the court to take jurisdiction over his pending claims of defamation and tortious interference with contract. Plaintiff seeks a variety of declaratory and injunctive remedies as well as damages.

II. Findings of Fact and Conclusions of Law

A. Good Faith Immunity

The court notes at the outset that the members of the school board and the fact-finding panel enjoy limited good-faith immunity. In performing discretionary functions, these defendants are generally shielded from liability

for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For the plaintiff to recover damages, therefore, there must be both a finding of a constitutional violation and a finding that the official's decision was objectively unreasonable. An inquiry into the reasonableness of the official's conduct is unnecessary in this case, however, for the plaintiff has failed to established a constitutional violation.

B. Procedual Due Process Claims

Plaintiff was represented before the fact-finding panel by two attorneys, and he freely exercised his right to examine witnesses presented by the school board and to call witnesses of his own. Nevertheless, the plaintiff alleges

procedural due process violations in two areas. First, he claims that after the fact-finding panel had made its recommendations, the school board held an additional hearing about his dismissal without giving him notice and an opportunity to appear as required by Virginia Code §22.1-313 (D). Second, he charges that both the fact-finding panel and the school board were biased against him by the actions of defendants Feggans, Gaines, Scott, Gutierrez, and Lewis.

In alleging that the school board failed to follow the procedure mandated by law, plaintiff misinterprets the applicable sections of the Virginia Code. Under Code § 22.1-310 (B), either the grievant or the school board may elect a hearing by a fact-finding panel prior to a decision by the board. If the grievant elects such a hearing,

as the plaintiff did in this case, Code § 22.1-310 (C) specifies that he has no right to a further hearing by the school board. If the school board decides to hold a further hearing, however, it must notify the grievant in writing under Code § 22.1-313 (D). It is this section which plaintiff claims was violated by the school board.

Clearly, the notice requirement of § 22.1-313 (D) would be triggered only if the school board were to hear evidence beyond the transcript, findings, and recommendations of the fact-finding panel. A contrary interpretation would grant the grievant an automatic second hearing, which Code § 22.1-310 (C) specifically forbids. In the present case, the evidence indicates that the school board considered only the transcript, findings, and recommendations of the fact-findings panel at its meeting

on June 28, 1982. This meeting of the school board to consider and act upon the recommendations of the fact-finding panel was not in itself a further hearing under the statute. Therefore, plaintiff was not entitled to notice of this meeting and the lack of notice did not violate his due process rights.

On plaintiff's charges that both the fact-finding panel and the school board were biased, the court finds no genuine issue of material fct remaining. Panel members Landin and Garrison, who constituted a majority of the panel,[1]

---

[1] The remaining panel member, Mrs. May, was chosen by the plaintiff himself under Code §22.1-312 (A). Mrs. May concurred with the other panel members in finding that Lee's conduct of his personal business constituted a conflict with his official duties, but she disagreed with the finding concerning Lee's actions as chairman of the Minority Task Force. She also differed with the majority's recommendation of dismissal, recommending instead that the school board suspend Lee without pay

(Footnote Continued)

have submitted affidavits swearing that they wer not influenced or pressured by any person and that they considered only the evidence presented to the panel in making their recommendation to dismiss the plaintiff. Likewise, school board members Sutton, Tolbert, Strong, and Haden[2] have all submitted affidavits swearing that the newspaper articles did not affect their decision to dismiss Lee, that they based their decision solely on the recommendation of the fact-finding panel and the transcript of the panel hearings, and that they

---

(Footnote Continued)
so that he could effectuate his retirement. Va. Code §22.1-312(F) states, "The facts found and recommendations made by the panel shall be arrived at by majority vote of the panel members."

2 The vote to dismiss the plaintiff was 6 to 0, with defendants Sutton, Tolbert, Strong, and Haden supplying a majority of the votes. Under Code §22.1-313(C), an employee may be dismissed by a majority of a quorum of the school board.

did not discuss the merits of the case with any person prior to the deliberation of the school board on June 28, 1983. Based on the evidence in the record, the court rules that neither the fact-finding panel nor the school board was biased or improperly influenced. The court therefore awards summary judgment to the defendants on these issues.

C. Substantive Due Process Claims

Plaintiff alleges two substantive due process violations. First, he alleges that the evidence did not support the findings made by the fact-finding panel concerning plaintiff's conduct of his personal business and his performance as Chairman of the Minority Task Force, supra. Second, plaintiff alleges that the grounds cited by the school board, supra, do not constitute just cuase under the law for his dismissal, which

was recommended by a majority the fact-finding panel and executed by a 6 to 0 vote of the school board.

In reviewing decisions of this kind, this court "may not usurp the discretionary power of the school board but must judge the constitutionality of its action on the basis of the facts which were before the Board and on its logic." Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966). Moreover, this limited review should be exercised by the court on a motion for summary judgment. As the court noted in Gwathmey v. Atkinson, 447 F. Supp. 1113, 1117 (1976):

> If Plaintiff were entitled to a trial de novo, then of course there would be unresolved issues of fact remaining. But he is not so entitled. If this court were required to look beyond the purported reasons for the School Board's action, then again, perhaps, there would be issues of fact remaining. But neither is this required of us under the scrutiny appropriate herein.

Indeed, under the rule of Wood v. Strickland, 420 U.S. 308 (1975), all the plaintiff has standing to ask of the court here is to determine whether there was evidence before the school board supporting its decision.

In this case, a review of the administrative record refutes the plaintiff's allegation that the findings and recommendations of the fact-finding panel were not supported by evidence. In four days of hearings, the panel heard testimony from 24 witnesses and received 50 exhibits. This body of evidence provided ample support for the findings and recommendation of the panel. Indeed, the record clearly establishes that Mr. Lee regularly conducted his person business on county time, that he mixed his private business affairs with his public duties, and that he made some improper hiring

decisions as chairman of the Minority Task Force.

Plaintiff's allegation that the school board dismissed him without sufficient cause likewise fails. Virginia Code § 22.1-307 provides school boards with broad discretion in dismissing employees:

> Teachers may be dismissed or placed on probation for incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, conviction of a felony or a crime of moral turpitude, or other good and just cause. (Emphasis added).

In dismissing the plaintiff on the grounds that he "intermix[ed] his private business affairs and his public responsibilities to the serious detriment of the school system, and ... improperly hire[d] and place[d] at least one teacher in his position as Chairman of the Special Task Force for Minority Hiring which greatly endangered the success of that

program," the school board acted well within the limits of its discretion and had ample evidentiary support for its action.

D. Racial Discrimination Claim

In his second amended complaint, plaintiff added an allegation of racial discrimination. Claims of racial discrimination brought pursuant to 42 U.S.C. §§ 1981 and 1983 require proof of intentional discrimination. Washington v. Davis, 426 U.S. 229 (1976); General Building Contractors Ass'n v. Penn, 458 U.S. 375 (1982). In this case, the plaintiff has offered no specific facts demonstrating discriminatory intent, alleging only that he was treated differently from white employees, that he was replaced by a white employee, and that he was dismissed solely because of his race. If this matter were before the court upon a simple motion to dismiss,

the appropriate course of action would be to dismiss this court without prejudice. Here, however, the motion has been converted to a motion for summary judgment, and the defendants have offered to the court affidavits from a majority of the school board, swearing that they based their decision to dismiss the plaitniff solely upon the record, findings and recommendations produced by the fact finding panel. Likewise, the defendants have submitted affidavits from a majority of the fact finding panel, swearing that they based their findings and recommendations solely upon the evidence presented to the panel. As noted earlier, this record provided an ample basis for dismissing the plaintiff, and this basis was a non-discriminatory one. In contrast to the defendants, the plaintiff has offered no materials to support his

bare allegation of racial discrimination. The court therefore finds no genuine issue of material fact remains with respect to the issue of racial discrimination, and awards summary judgment to the defendants on this issue.

E. §1985 Claim and Pendent Claims

In addition to his §1981 and §1983 claims, plaintiff alleges that defendants Feggans, Gaines, Scott, Gutierrez, and Lewis, jointly and severally performed acts and made statements which were maliciously or intentionally calculated to influence adversely the public, the fact-finding panel, and the school board. Plaintiff specifically charges that defendants Feggans, Gaines and Scott were responsible for the story in the September 22, 1982, edition of the Daily Progress which reported that Scott had felt pressured to rent a substandard apartment from the plaintiff because

of his role in hiring her; that defendant Gutierrez made prejudicial statements to the press and that he improperly influenced one or more of the members of the fact-finding panel; and that defendant Lewis falsely testified about the plaintiff's hiring of W. T. Holmes. Plaintiff's memorandum in response to the motion to dismiss characterizes this portion of the complaint as a §1985 (3) claim. Although §1985 is mentioned nowhere in the complaint, the Court will accept this characterization and treat the allegations accordingly.

It is now well established that §1985 (3) applies only to racial or other class-based invidious discrimination. Griffin v. Breckenridge, 403 U.S. 88, 102, (1971); United Bhd. of Carpenters & Joiners of America, Local 610 v. Scott, 463, U.S. 825, 834 (1983), reh'g denied, 464 U.S. 875 (1983).

Here, however, the plaintiff has failed to allege any racial or other class-based discrimination on the part of defendants Feggans, Gaines, Scott, Gutierrez, and Lewis, four of whom, like the plaintiff, are black. In fact, the only allegation of racial discrimination in the complaint is plaintiff's claim that he was dismissed from his position solely because of his race, which would be a violation of Title VII. Even if this employment discrimination claim were to embrace all five of the purported conspirators,[3] it would still provide no basis for a § 1985 claim, for the Supreme Court has held that § 1985 (3) may not be invoked to redress violations of Title VII. Great American Federal Savings

---

[3] Only superintendent Gutierrez and board member Feggans might be reached by such a claim. Defendants Scott, Gaines and Lewis had no hiring or firing authority over the plaintiff's position.

& Loan v. Novotny, 442 U.S. 336 (1979). Because plaintiff has failed to allege any racial discrimination outside of a Title VII violation, and has failed to offer any evidence of racial discrimination on the part of the defendants Feggans, Scott, Gaines, Gutierrez and Lewis, the court will award summary judgment to the defendants on this issue.

With respect to the pendent claims of defamation and tortious interference with contract which formed the substance of the conspiracy claim, defendants have properly supported their motion for summary judgment with affidavits. In response, plaintiff has failed to set forth specific facts that show a genuine issue exists. Rule 56(e) of the Federal Rules of Civil Procedure states:

> When a motion for summary judgment is made and support as provided in this rule, an adverse party may not rest upon the mere allegationsd or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Because plaintiff has failed to make the required showing, the court will award summary judgment on the pendent claims to the defendants.

The Court having awarded summary judgment on all claims to the defendants, the case will be dismissed and stricken from the docket. An appropriate Order shall this day issue.

ENTERED: JAMES H. MICHAEL, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

OTIS L. LEE,
Plaintiff

v.

THE ALBEMARLE COUNTY SCHOOL BOARD, et al.,
Defendants

CIVIL ACTION NO. 84-0038-C

JUDGE JAMES H. MICHAEL, JR.

O R D E R

For the reasons stated in open court on December 20, 1984, it is this day

ADJUDGED AND ORDERED

as follows:

1. The defendants' motion to dismiss shall be, and it hereby is, denied.

2. The defendants' motion for summary judgment shall be, and it hereby is, denied.

3. By agreement of counsel and with the concurrence of the court, the

defendants shall not be required to answer to original complaint. Plaintiff shall file his amended complaint on or before January 31, 1985. The defendants shall answer to amended complaint within thirty (30) days of the date it is filed.

The Clerk is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: JAMES H. MICHAEL, JR.

DATE: JANUARY 11, 1985

APPENDIX B

Otis L. Lee, Grievant

v.

Carlos E. Gutierrez, Division Superintendent of Albemarle County Schools

FACT FINDING OPINION

After consideration the transcript of the proceedings, the exhibits produced and thoughtful and detailed briefs provided by the parties, a majority of the fact-finding panel finds that the issues dispositive of the case are:

1. The management of the Minority Task Force by Mr. Lee as chairman; and

2. The propriety of conducting personal business affairs during normal working hours.

Based on the evidence when considered as whole, a majority of the panel finds as a fact that:

While the Minority Task Force was generally successful, Otis Lee exercised independent judgment as chairman of

the Minority Task Force which was inconsistent with the proper functioning of the Task Force and its goals.

Based on the evidence when considered as a whole, the panel unanimously finds as facts that:

1. Otis Lee conducted personal business on a regular basis during the course of his employment as Administrative Assistant to the Superintendent of the Albemarle County School Division which constituted a conflict with his official duties.

2. The personal business activities which were conducted during working hours occurred over a period of time, were not concealed by Otis Lee, were to a greater or lesser degree known to officials in the Albemarle County School Division and were not specifically addressed as they occurred.

RECOMMENDATION

A majority of the panel finds that these actions are grounds for dismissal under the law. The remaining member of the panel feels that certain of Mr. Lee's actions were improper but not sufficient to warrant dismissal and since the actions developed and occurred over a period of time, were to a greater or lesser degree known to officials in the Albemarle County School Division and were not specifically addressed as they occurred, recommends that Otis Lee be suspended for 90 days without pay and that during these 90 days Otis Lee effectuate his retirement.

Respectfully submitted,

Christine N. Garrison
Ella C. May
David Craig Landin

COUNTY OF ALBEMARLE
Department of Education
401 McIntire Road
Charlottesville, VA 22901

June 29, 1983

Mr. Otis L. Lee
Leonard-Belle Heights
1876 Woodberry Road
Charlottesville, VA 22901

Dear Mr. Lee:

By a vote of six to zero, the Albemarle County School Board passed the following motion at its meeting on June 28, 1983:

> Having read the complete transcript of the Fact-Finding Hearing in the Otis L. Lee grievance procedure, and having considered the recommendations of the Fact-Finding Panel, the Board has determined:
>
> - That Mr. Lee did intermix his private business affairs and his public responsibilities to the serious detriment of the school system, and
>
> - That Mr. Lee did improperly hire and place at least one teacher in his position as Chairman of the Special Task Force for Minority Hiring which greatly endangered the success of that program.
>
> The Board accepts the recommendation of the majority of the Fact-Finding

Panel and does hereby dismiss Mr. Lee.

Please consider this letter the Albemarle County School Board's written decision in this matter.

Sincerely,

Charlotte C. Self
Clerk, School Board

Portions of Deposition of Ella C. May, Fact Finding Panel Member, Dated September 13, 1984.

(E. May on Direct by Mr. Buchanan)

Q. Well, once the evidence was in, during the course of deliberations, did either say that he or she knew how he or she had to vote?

A. A statement was made, and I cannot quote verbatim, but the meaning of the statement was - this was Mrs. Garrison - David, you've got to help me, my job is riding on this, or this - in other words, what it was saying was that, my job is related to this.

Q. What is your impression of whether or not Mr. Lee was treated fairly by the fact-finding panel?

A. Well, I guess about the biggest thing there would be the fact that I didn't agree with what was done, or what was said. That would - would be self-evident; if I didn't agree with it, then I didn't think it was fair. Because I was trying to judge what I though was fair. So I mean, that - that's a question that each person brings his own value to. So, in that I didn't agree, I didn't think the decision was a fair one.

Q. Ms. May, were you aware of any social relationship between Mrs. Garrison's family and the family of Mr. Landin?

A. Not during the time of deliberation, no.

Q. Did you subsequently become aware of any social relationship between the two mentioned families?

A. When everything was just about over Mrs. Garrison made the remark that she played tennis with Mr. Landin's wife.

Q. He [Mr. Landin] changed his vote from what to what?

A. He had been voting with me, and when it came back the last time, and I began to read; I said, oh, you've changed everything. I said, you've even changed your vote, and he said, that's right.

Q. So before he changed his vote is it your impression that he was not going to vote for dismissal?

A. Yes, it was. Because he had voted the same thing I had voted all the way through. And when he first agreed with me, Mrs. Garrison asked him; said, can you agree with that? He said, yes, for the time being I - I - I can - I can agree with what she's saying. So since there was no change, I assumed that the final draft would be like all the rest had been on that issue, but it had been changed. And so many things had been changed, until it kind of upset me.

Portion of Deposition of Christine N. Garrison, Fact Finding Panel Member, Dated September 14, 1983.

(C. Garrison on Direct by Mr. Dick)

Q. What was said in your visit to the school systems before you learned that you were going to be a panel member?

A. I can't remember any specifics, frankly. I mean people were distressed by just the notoriety and the - and having things in the paper; what do you think about it; what do you think it means; what do you know from central office; and I simply - I was so new, lots of times I'd say, I don't know anything. I just know basically what we all know from the paper.

Q. You said the lot of them were upset with the notoriety of it?

A. Well, I think anybody would be.

Portions of Deposition of Superintendent Carlos Y. Gutierrez Dated September 17, 1984.

(C. Gutierrez on Direct by Mr. Dick.)

Q. All right. As far as Mr. Lee being on the Task Force, why did you choose him as chairman?

A. Because he was the senior black administrator and employee of the division, and I can recall having some discussion with the School Board about that, and it was my feeling that he deserved, I guess, for want of a better word, the right to operate in that position.

Q. And was it because he'd had a history of dealing with the black problems of the school system?

A. No. That's not why I chose him. I chose him because of what I just said, he was the senior ranking administrative officer.

Q. Were you aware that he was intimately involved in the integration of Albemarle County Schools?

A. No.

Q. Were you aware that he hired black teachers under Superintendent Gail's administration?

A. I guess I knew that he - he was known as a recruiter among the black colleges in the south, specifically

North Carolina and Virginia, yes. I knew that. He'd gone out on a number of recruiting trips.

Q. Were you aware that he boarded black teachers, during the early years of integration, in his house?

A. No.

Q. Okay. In designing the parameters of the Minority Task Force, was it your decision or the Board's decision, that the Task Force would hire solely black teachers?

A. That was - that was the primary focus, because black teachers certainly were the focus because the allegations had been that "black teachers will not come to Albemarle County", and I did not agree with that, so that was the - that was the - purpose of the Task Force. Now, if the Task Force, in their interviews at the various campuses, found competent teachers of any color or any sex, they certainly were free to hire those people, but the focus was on hiring black teachers.

Q. In recommending to the Board who would be hired, were they not all black teachers who were recommended?

A. As I recall, they were, yes.

Q. Are you aware that [Mr. T. Lewis] testified on two occasions that Mr. Lee had the final authority on approving the black minority hirees to the Board?

A. Well, I wasn't aware of anything that he's testified, but I know that that's true, that Mr. Lee did have the final authority.

Q. While you're on that, can you tell us why it wasn't? I can assume I know why, but would you tell us why it was not the most popular - politically popular project? [The Minority Task Force to hire only black teachers.]

A. Well, in my opinion there's a there's a - great amount of latent racism still in existence in our organization.

Q. Did that surprise you?

A. Yes. I suppose that was my naivete, coming from a different part of the country.

Q. Was that something that you learned about as you arrived or something someone warned you about before you arrived?

A. No one warned me.

Q. Okay. You learned about it from day-to-day?

A. That's right.

(con't)

A. Theoretically; in actuality there were some problems there.

Q. In what regard? Was Mr. Hurlburt

opposed to just hiring minorities alone in the Task Force?

A. I had the feeling that my appointing of this Task Force was an affront to those who had had responsibilities for hiring in the past, and I had the feeling there were some professional jealousies or differences of opinion about that.

Q. How much resistance did you experience on the Minority Task Force?

A. Very little until the placement actually began to occur, and when it did, I experienced resistance.

Q. Was that squabbles between the committee and the chairman, mostly? Could it be identified ...

A. No, I'm referring to the - to the placing of teachers in specific schools. Certain principals would call and say, I have this person I'd prefer to hire, and I'd say, well, I'm sorry, but that person is going to be placed there. I would back the Task Force on its placement recommendations.

Q. Okay. This was part of the minority hiring.

A. Yes.

Q. ... concept?

A. Yes.

MR. JONES: Excuse me, Gentlemen, I must depart.

Q. So, it was the goal of the Minority Task Force to place the minority-task hiree without regard to the school principal's input?

A. It wasn't the goal to work in opposition of the principal. Inasmuch as possible, we had hoped that there could - it could be done cooperatively. This - this was a weakness in the plan, as I conceived it or actually as it was implemented, and that is that there was unanticipated strife that occurred regarding that procedure between Mr. Lee as Chairman and Tom Hurlburt, who was the Assistant Superintendent, who previously had done all the hiring. Now, I had talked with Mr. Hurlburt, and I had asked that all - all placements in all hiring be under his general supervision. He and Otis both knew that . Tom and Otis both knew that. And but in actual working out, it didn't work that way, and Tom would find himself besieged by complaints from principals, and he would - there was some problem there. So the - what I'm saying is that the in retrospect, I probably should have been more clear in - in stating the rules as to how this would be done before the process began.

Q. Did you present the Minority Task Force recommendation yourself, or did Mr. Lee present it to the Board?

A. As is common practice in my operation, I call on individuals to make presentations to the Board indicating

that presentation or that endorse - that has my endorsement, and who actually made the presentation, I believe Mr. Lee did. I didn't.

Q. All right. When Mr. Lee made the presentation, he was there on your authority, is that correct?

A. Yes.

Q. All right. Were you present when he made the presentation?

A. I'm - I think I've made all Board meetings since I've been here.

Q. All right. Do you recall whether any Board member questioned Mr. Lee as to the people that he was recommending and his committee?

A. There was some discussion about certification areas; not about the individuals, but about certification areas. Rumors were circulating at that time that - that not - you see, in the first round, these people had to be hired by the Board before they were actually placed in the particular positions, and there was some concern on the part of the Board that we may have employees whom we couldn't place. That discussion did occur, I believe, in the very first round.

Q. All right. And were there efforts made between the Board, and Administration, and the Committee, to rectify any of those problems?

A. Oh, yes. We worked on it throughout

the entire spring, and came down at the end of the process to a few - a handful of problems out of a total of thirty-some teachers hired.

Q. Were you satisfied at that time with the resolution of those problems?

A. I would have been more satisfied if we'd been able to get them placed in the appropriate certification area, and - but, yes, in general I thought it was a successful project.

(con't)

A. September 22nd, this - this is the article that appeared during my absence at a superintendents' conference in Roanoke. I came back and had a number of back issues of the paper to read. I had not seen this article prior to receiving a call from the president of the School Board. And she [Chairman of the School Board] informed me of the article and was, I might say, hopping mad about the whole thing.

Q. Was that ...

A. I calmed her down, told her that I needed time to read it, get some information, and as I recall, she and I had words. I said, this is an administrative matter. The Board does not belong involved at this time - in so many words, "stay out of it, I'll take care of it and report it to you".

Q. Did you receive calls from other Board members about it?

A. I did, the following day. This is the 22nd, a Wednesday.

Q. How would you describe ...

A. I would guess that the conference would have been Wednesday and Thursday, and I returned on Thursday night, so it would have been a day after the fact that I would have seen this.

Q. How would you describe their conferences with you on the phone about the article? Were they as excited as Mrs. Haden, the Chairman of the Board?

A. They were embarrassed that the school division would be called to the public attention through something like this. I can't, again, put myself into their minds, but they certainly were upset.

Portions of Affidavit of Otis L. Lee in opposition to the motion for summary judgment.

I, Otis L. Lee, do swear to the truth of the following and ask for a trial to restore my job, my name, and my constitutional rights.

1) I was a tenured teacher, principal and administrator in the Albemarle County School System for 23 years and an educator in the profession for 36 years.

2) In the 23 years with the Albemarle County School System, I was never placed on probation, suspension nor did I receive any letter of reprimand.

3) Superintendents under whom I served, Paul Cale, Clarence McClure, Leslie Walton, and Carlos Gutierrez, all knew that I had outside property interests including being a landlord and that from time to time I would attend

to that business and I have not in any way done anything in outside interests to seriously jeopardize or cause a detriment to the School System. Miss Scott, Mrs. Gaines and Mr. Feggans put a news story in the paper that was not true and that news article on their efforts was a serious detriment by their efforts not mine.

4) I know that other school officials have outside property interests besides me, yet I am the only one now, and I say because I am black, that has had this sort of travesty inflicted on me.

a) John Biller present principal of Walton School, has outside property interests. In fact, he sold a piece of property to the School Board adjacent to Stoney Point Elementary School.

b) Mary Chamberlain was a real estate salesman, she being a elementary supervisor in Central Office and she showed a Mr. Clarence Kee a house belonging to one of the other central office staff during school hours.

c) Mr. Charlie Simmons' secretary in 1978 or 1979 get her real estate license while she was in the Central Office and was selling real estate from her central office position. She later left and joined Roy Wheeler.

d) Joe Bingler, coach at Albemarle County High School has a real estate license and he sells real estate.

e) Clarence McClure, as assistant Superintendent and Clifton McClure who was his brother sitting on the School Board owned rental real estate and Clarence McClure took care of those matters during the school days. He continued that as Superintendent.

f) Elizabeth Bailey who is principal at Murray Elementary School had rental units. She rented to teachers from time to time.

g) Fulton Marshall, principal at Greer School, had rental property. I think he rented to teachers also although I'm not as certain.

It was no secret in the school what any of us did in the way of outside interest or employment. Over 50% of our teachers have second jobs and Dr. Gutierrez admitted that in his deposition.

5) Clarence McClure knew from

time to time that I received calls from my tenants in the office or people called looking for housing. It was never excessively done and it was never concealed. It was an excepted fact.

6) Carlos Gutierrez knew as he testified that from time to time I would receive calls, need to go to the Court, and although I don't recall anyone coming to see me while at work, Dr. Gutierrez testified that he saw people come into my office looking for me and yet he never complained to me about it if it did happen. His office was right next to mine at his insistence. Dr. Gutierrez took an interest in my outside activity. We socialize together and we would talk about all of those things. He never once complained.

7) My office was to have been with Tom Hurlburt to work on personnel and Carlos Gutierrez moved me next to

him from where I was originally assigned in the new County Office Building plans. He said he did this because I was going to head up his idea of a Minority Task Force Hiring group to hire exclusively black teachers which I did.

8) Not one Superintendent whom I served under ever reprimanded me for pursuing these outside interests and largely so because my quality of performance never became unacceptable to any Superintendent.

9) It was a customary practice around Central Office to have outside interests all of these years. As an Administrator, I was allowed great leeway in using my time. That was no secret either as long as I got my job done. There were many hours I spend outside of school hours doing school work.

10) My dismissal was a total shock but not as much a shock and demoralizing

feeling as having the School System level their false charges in the Daily Progress continuously before I even had a chance to have the benefit of presenting my side, the truthful side, to the Superintendent, and the Board muchless the Panel. No one ever bothered to talk with me on the matter. I read it all in the papers and was the victim of a smear campaign.

11) It is clear to me now that my tenured job was wrongfully taken from me in violation of my constitutional rights, my professional reputation, and that these people have placed a horrendous stigma on me in my home community that I do not deserve. I can only vindicate myself before an impartial Court. My job is gone.

12) My work as Chairman of the Minority Task Force was openly accepted in a public hearing by the Superintendent

and the School Board on May 10, 1982. The Harriet Scott press matter was the only excuse they had to attack the Minority Task Force after it had been accepted by the Board and I was commended by the Superintendent including a very favorable evaluation in his letter to me that we had been successful.

13) I have never been a immoral school official, nor an incompetent one as I was accused of, nor do I know today how the School System can support such a false charge in view of their acceptance of my work and the congratulations that I received. Thus I firmly believe that only hatred and bad faith motives support the School Board's dismissal action that evolved from the named people in this suit. The Board itself was biased and the reasons they gave to dismiss are vague and cannot point to one thing to support

their decision.

Given under my hand this 15th day of November, 1984.

OTIS L. LEE

Testimony of Otis L. Lee at grievance panel hearing.

(Otis L. Lee response.)

A. ... I said, Harriet, I have an apartment if you want it. I'll be happy to show it to you when you get here and you can make that decision. So, she asked me how much was it and I told her two hundred fifty dollars a month and there had to be a two hundred and fifty dollar deposit on it if she wanted it. So, she said, okay and then she assured me she was going to be here Sunday and I believe that was all.

Q. After you spoke with her on the telephone on Friday afternoon which would have been the 17th of September, 1982 did you have a conversation with Carolyn Gaines?

A. Yes, after I hung up from Harriet, before I left the office I called Carolyn Gaines' house and asked her if Harriet had contacted her.

Q. In your initial conversation with Miss Scott you gave her Carolyn Gaines' telephone number?

A. Yes, I gave her the telephone number.

Q. And you requested that she, Harriet Scott, contact the principal, Carolyn Gaines?

A. Yes.

APPENDIX C

Virginia Code §22.1-307, Dismissal, etc., of teacher; grounds.

Teachers may be dismissed or placed on probation for incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, conviction of a felony or a crime of moral turpitude or other good and just cause. (Code 1950, §22-217.5; 1968, c. 691; 1975, c. 308; 1980, c. 559.)

Virginia Code §22.1-302, Written contracts required; execution of contracts; rules and regulations.

A written contract, in a form prescribed by the Board of Education, shall be made by the school board with each teacher employed by it, except those temporarily employed as substitute teachers, before such teacher enters

upon his duties. Such contract shall be signed in duplicate, with a copy thereof furnished to both parties. (Code 1950, §22-217.2; 1968, c. 691; 1980, c. 559.)

Portion of Virginia Code §22.1-304, Reemployment of teacher who has not achieved continuing contract status; effect of continuing contract; resignation of teacher; reduction in number of teachers.

If a teacher who has not achieved continuing contract status received notice of reemployment, he must accept or reject in writing within fifteen days of receipt of such notice. Except as provided in §22.1-305, written notice of nonrenewal of the contract must be given by the school board on or before April fifteenth of each year. If no such notice is given a teacher by April

fifteenth, the teacher shall be entitled to a contract for the ensuing year in accordance with local salary stipulations including increments.

Teachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service and prior to the age at which they are eligible or required to retire except as hereinafter provided. Written notice of noncontinuation of the contract by either party must be given by April fifteenth of each year; otherwise the contract continues in effect for the ensuing year in conformity with local salary stipulations including increments.

A teacher may resign after April fifteenth of any school year with the approval of the local school board. The teacher shall request release from

contract at least two weeks in advance of intended date of resignation. Such request shall be in writing and shall set forth the cause of resignation.

In the event that the board declines to grant the request for release on the grounds of sufficient or unjustifiable cause, and the teacher breaches such contract, the certificate of the teacher may be revoked under regulations prescribed by the Board of Education.

As soon after April fifteenth, as the school budget shall have been approved by the appropriating body, the school board shall furnish each teacher a statement confirming continuation of employment setting forth assignment and salary.

Nothing in the continuing contract shall be construed to authorize the school board to contract for any financial

obligation beyond the period for which funds have been made available with which to meet such obligation.

A school board may reduce the number of teachers, whether or not such teachers have reached continuing contract status, because of decrease in enrollment or abolition of particular subjects. (Code 1950, §22-217.4; 1968, c. 691; 1978, c. 147; 1979, c. 98; 1980, c. 559.)

APPENDIX D

The Daily Progress

CHARLOTTESVILLE, VA. WEDNESDAY, OCTOBER 6, 1982

School Official Dismissed

By JULIE YOUNG
of The Progress Staff

Otis L. Lee has been fired as administrative assistant in the Albemarle County school system's central office.

Superintendent Carlos Gutierrez confirmed today that "a dismissal action against Mr. Lee has been taken."

Under grievance procedures outlined in the state code, Lee has 15 days to request documentation of the charges that brought about his dismissal. Gutierrez refused to be specific about the nature of those charges.

Lee was suspended Sept. 25 after a teacher he had hired told The Daily Progress that she felt pressured by Lee to rent an apartment that he owned. Harriet Scott, whom Lee hired Sept. 17, said she had feared that turning down Lee's offer might jeopardize her new job at Yancey Elementary School.

At its Sept. 28 meeting, the Albemarle County School Board followed Gutierrez's recommendation and extended Lee's suspension which, under school board policy, could have been continued for up to 60 days.

Gutierrez said at the time that he wanted to conduct an "intensive investigation" into conflict of interest, misuse of public trust, and other charges against Lee.

Lee, 60, had been an employee of the Albemarle County School System for 22 years.

A native of Fitzgerald, Ga., Lee is a graduate of Fort Valley (Ga.) State College and holds a master's degree in school administration and supervision from Virginia State College.

He came to Albemarle County in 1960 after teaching in Georgia schools for five years and serving as a principal in the Louisa County school system for eight years.

Lee served for six years as principal of the Virginia L. Murray School in Ivy. He became supervisor of records and reports in the central administration in 1966.

In 1967, Lee was named assistant principal at Henley Junior High School, a position he held until he became principal of McIntire School three years later.

After his tenure at McIntire, Lee was named principal at Walton Middle School, where his administrative ability and disciplinary judgment came under criticism from Walton parents and teachers.

Lee

His position as administrative assistant for personnel and administration was created for him in 1977 after he was relieved of the Walton Middle School principalship.

He became administrative assistant to the superintendent in 1981. Lee's primary duty of late had been the heading of a minority recruitment task force, which was appointed by Gutierrez.

The task force makes recruiting trips and conducts on-campus interviews at predominantly black colleges to screen potential minority applicants for teaching positions.

Miss Scott was one of the applicants Lee interviewed last February on a recruiting trip to Bennett College in Greensboro, N.C.

The Daily Progress

© 1982 Charlottesville Newspapers Inc.

ESTABLISHED 1892 VOL. 91 NO. 265 CHARLOTTESVILLE, VA. WEDNESDAY, SEPTEMBER 22, 1982

Teacher Felt Pressured To Rent

By JULIE YOUNG
of The Progress Staff

A teacher hired last week by a gh-ranking Albemarle County hool official who also owns rea l property in the city said Tues y that she rented one of his ouses sight unseen because she ared it would jeopardize her job turn down his offer.

Upon seeing the house, which s since been cited for two city de violations, the teacher, Har t Scott, refused to move in be use she considers it substandard.

Otis L. Lee, administrative as tant in the central office of the lbemarle County Schools, leased e housing to Miss Scott after he fered her a first-grade teaching b at Yancey Elementary School st Friday.

"I signed the lease because I d no other choice. I was put in a rner and I don't think I can live ere," Miss Scott said.

A city citation issued Tuesday said Lee improperly used a single family dwelling as a two-unit apartment. City housing inspector Jerry Tomlin said Lee was given 15 days to correct the violations or 10 days to appeal the citation.

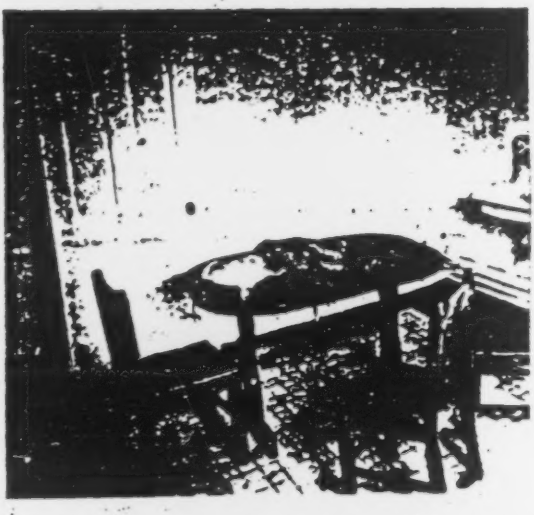
Lee said today that he "thought I was doing Miss Scott a favor, I was just trying to befriend her." Lee said he did not pressure Miss Scott to take the apartment, "but we were just trying to help find the lady a place to live."

"We have tried to help teachers relocate here and have found them many places over the years," Lee said. "I have shown that very apartment to others and they didn't want it, which was OK. Miss Scott didn't have to take it. I told her that repeatedly."

"Mr. Lee didn't tell me he would help me find a place to live, he told me he had found me a place to live," Miss Scott said in an interview Tuesday.

"I was amazed that someone

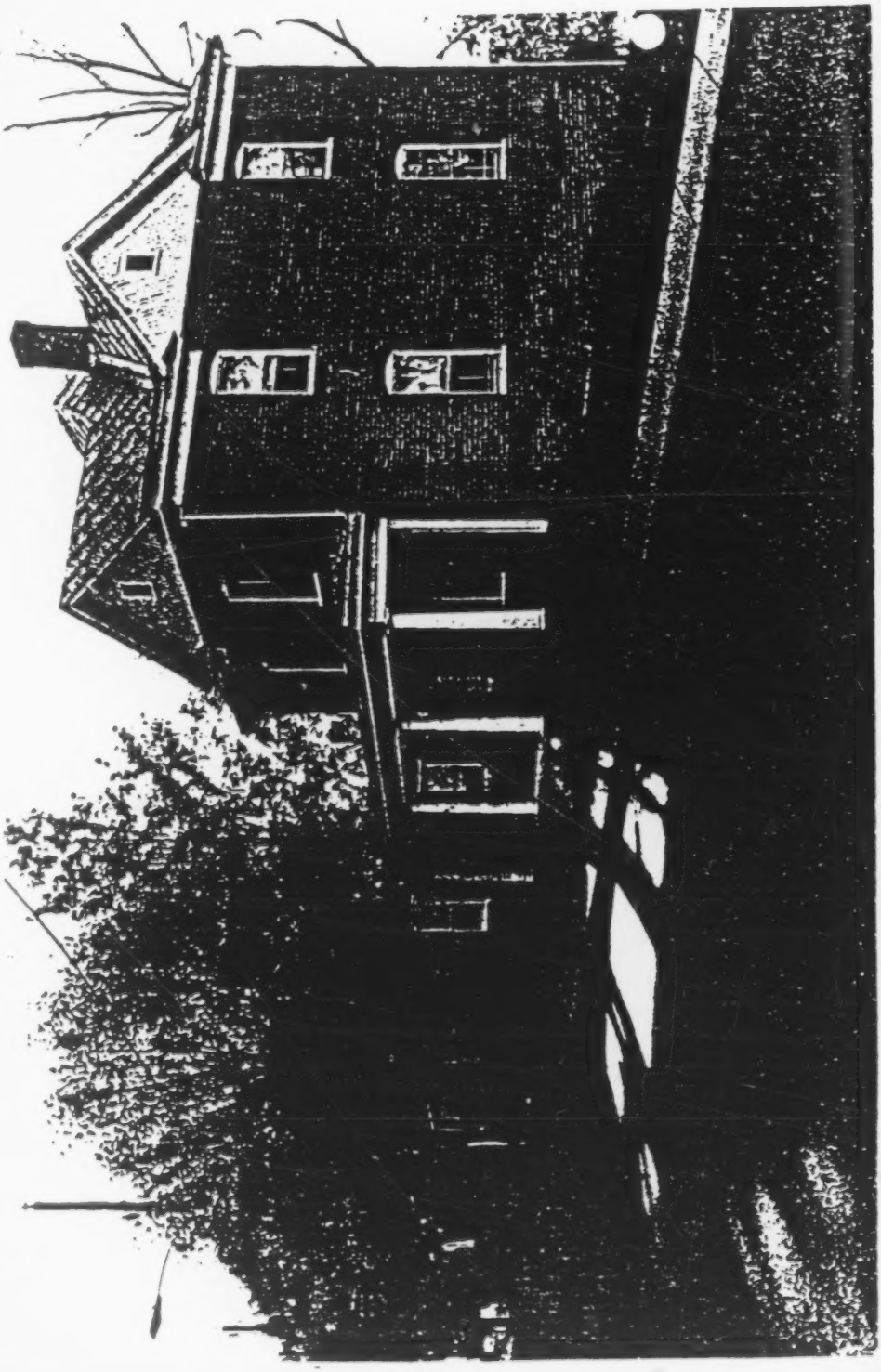
Please See LEE, Page A16

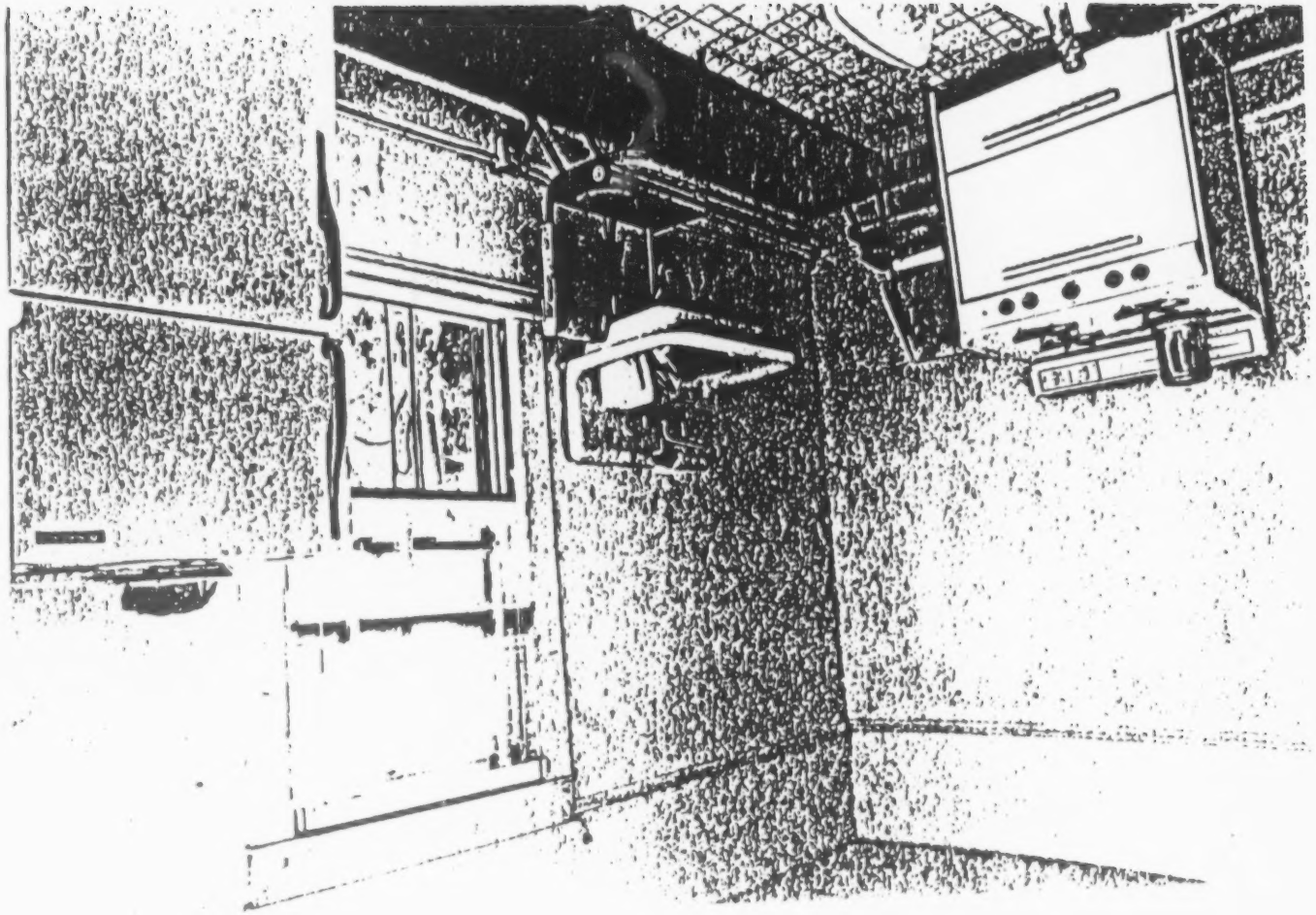


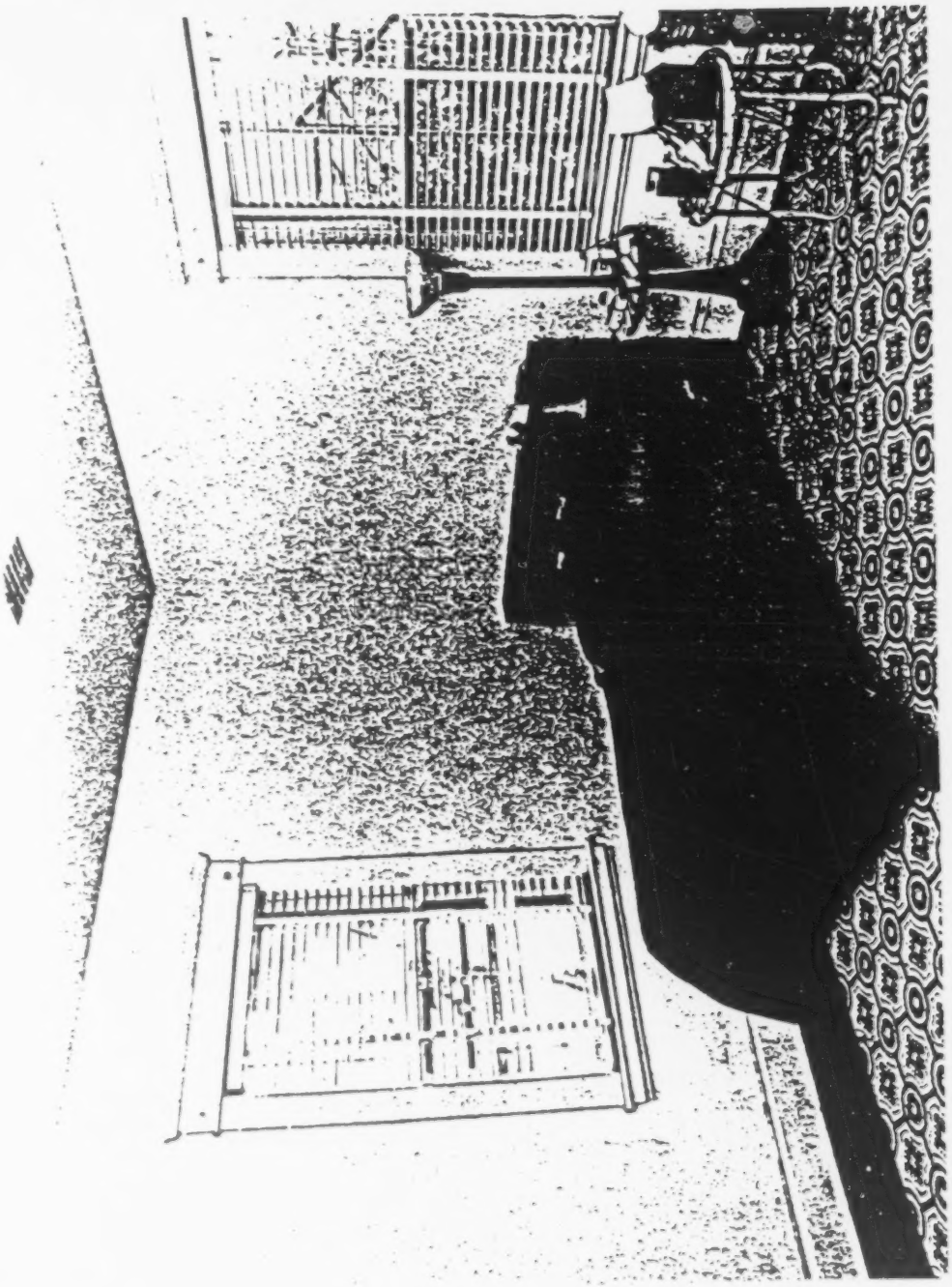
KITCHEN OF HOUSE OTIS L. LEE RENTED TO NI
Teacher Rented House From School Officia

ITCHEN OF HOUSE OTIS L. LEE RENTED TO NEWLY HIRED TEACHE
Teacher Rented House From School Official Sight Unseen

NOTE: ("Sight Unseen" is False)
Miss Scott inspected the apartment pursuant to sworn testimony for nearly an hour with relatives before signing with Mr. Lee on a non-school day. The area is where a refrigerator and stove would go. The apartment was a two bedroom apartment (see building next pages).







The Daily Progress

School Official Probed On Conflict of Interest

9/24!

By JULIE YOUNG
of The Progress Staff

Albemarle County School Superintendent Carlos Gutierrez said today that he is investigating Otis L. Lee, his administrative assistant, for a possible conflict-of-interest violation and misuse of public trust.

Gutierrez said he "intends to act on the matter very, very shortly."

The Daily Progress reported Wednesday that a newly hired teacher at Yancey Elementary School in the county felt pressured by Lee to rent an apartment that he owned.

"I have responded to the story and I'm looking into the matter of misuse of public office on behalf of one of my administrators," Gutierrez said.

"I have interviewed the teacher, her mother, the principal (at Yancey) and Mr. Lee. My staff and I are in the process of investigating the entire matter and will make a public statement this afternoon."

Gutierrez said that several angles are being investigated. "There is the aspect of conflict of interest, doing business with an employee. There is the allegation that a public officer implied that there was a connection between a teaching job and renting an apartment. And there are other angles," he said. "I'm not just going to sweep this under the rug. I take the allegations very, very seriously. I'm conducting an intensive investigation, and I do intend to act very, very shortly."

The teacher, Harriet Scott, told The Daily Progress Wednesday that Lee told her an apartment had "already been found" for her when he called last Friday to offer her a first grade teaching position. Miss Scott had not seen the apartment until she arrived in Charlottesville on Saturday.

Upon seeing the house, Miss Scott said that she could not live in it because she considered it substandard. She has not stayed in the upstairs apartment since she signed the lease Saturday.

Miss Scott said she was afraid that turning down Lee's offer of housing might jeopardize her new job. She also said she was under

Please See PROBE, Page A10

★ Probe

Continued From Page A1

the impression that the school system or school board had found her a place to live.

The house, which was cited for two city code violations Wednesday, "should have been condemned," said Peggy Scott, Miss Scott's mother, who has stayed in Charlottesville with her daughter since she helped her move from Greensboro, N.C.

Lee said Wednesday that he "thought I was doing Miss Scott a favor." He also said that the two violations — not having a separate entrance or a proper kitchen for the upstairs apartment — were corrected two hours after he received the citation.

Lee said today that he has refunded Miss Scott's deposit and first month's rent — a total of $500 — and voided the lease.

"If she'll look in her mailbox, there is a letter and a check in there right now. I have cut off our relationship," he said.

"I wrote her a nice letter and told her to have a nice year and to let me know if I could be of assistance to her later on," Lee said.

★ Official

Continued From Page A1

said Friday that he had refunded Miss Scott's deposit and first month's rent — a total of $500.

Before coming to the central office of Albemarle County Schools, Lee was principal of the county's McIntire School.

A graduate of Fort Valley (Ga.) State College, Lee taught in Georgia for five years and in Louisa County for eight years before coming to Albemarle County.

The Albemarle County Schools administrative assistant earned his masters degree from Virginia State College.

Lee was principal of the Virginia L. Murray School in Ivy from 1960 to 1966 when he became supervisor of records and reports in the central administration.

He was named assistant principal at Henley Junior High School in 1967, a position he held until he became McIntire School principal.

No. 87-1875

In The Supreme Court Of The United States

OCTOBER TERM, 1987

OTIS L. LEE,

Petitioner,

v.

ALBEMARLE COUNTY SCHOOL BOARD, et. al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Douglas L. Guynn
WHARTON, ALDHIZER & WEAVER
100 South Mason Street
Harrisonburg, Virginia 22801
(703) 434-0316

George R. St. John
St. JOHN, BOWLING & LAWRENCE
416 Park Street
Charlottesville, Virginia 22901
(804) 296-7138

Counsel of Recorc for Respondents

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

Table of Contents

Table of Authorities

Petitioner Lee contends that the Fourth Circuit Court of Appeals erred in holding that a routine personnel decision, reached after an extensive hearing process, was legally permissible. This case presents nothing more than an employment contract dispute between an employee and a public employer, not meriting this Court's exercise of its judicial discretion of review.

Statement of the Case

The unanimous decision of the Albemarle County, Virginia, School Board (School Board) to terminate the Petitioner's employment was reached after an extensive, state-law prescribed dismissal process. The Petitioner elected a hearing before a

fact-finding panel which recommended the dismissal of the Petitioner to the School Board.

The fact-finding panel hearing consumed four days and resulted in 800 pages of hearing transcript and 50 exhibits. At the hearing, Petitioner Lee was represented by two attorneys and had not only the opportunity to cross-examine witnesses but to call witnesses on his own behalf in response to the evidence supporting dismissal. Many of the chief hearing witnesses against the Petitioner also are Black.

Prior to the hearing before the fact-finding panel, the Petitioner and his counsel were given detailed written notice by the School Superintendent of the grounds for the recom-

mendation of dismissal to the School Board. The gravamina of the dismissal action were as follows: Lee, as Chairman of the Special Task Force for Minority Hiring, allowed a young, newly recruited Black teacher to believe that her job somehow was tied to rental of one of Lee's numerous apartments; on many occasions, unlike any other School Board employee, Lee conducted his private, extensive landlord business during school hours; and Lee, as Chairman of the Special Task Force for Minority Hiring, improperly discharged his duties by giving preferential hiring consideration to a minority teaching applicant who clearly was unqualified for the job and who owed money to Lee. The extended fact-finding panel hearing resulted in evidence

supporting all of these allegations and others.

Argument

The Petitioner provides no special and important reason, as recognized by this Court, to grant certiorari in this case. See Rule 17. The Petitioner's arguments merely restate those made in the district court, which granted summary judgment, and in the circuit court, which concluded in a per curiam decision that the arguments were "utterly without merit" (Pet. App. 8-9).

Petitioner has had his case examined by no less than four tribunals, all of which have sustained his dismissal. He has received procedural due process for both property

and liberty interests, Perry v. Sindermann, 408 U.S. 593, 603 (1972) and substantive due process, Wood v. Strickland, 420 U.S. 308, 326 (1975). As the district court noted in its opinion, the administrative hearing before the fact-finding panel consumed four days and "the record [from 24 witnesses and 50 exhibits] clearly establishes that Mr. Lee regularly conducted his personal business on county time, that he mixed his private business affairs with his public duties, and that he made some improper hiring decisions as Chairman of the Minority Task Force" (Pet. App. 27-28).

Contrary to the Petitioner's contention, neither the district court nor the circuit court reached the

issue of immunity. It was not necessary, because the Petitioner failed to establish a constitutional violation (Pet. App. 20).

As to Petitioner's claim of racial discrimination, it is noteworthy that five of the named individual defendants are Black, including School Board member Feggans and fact-finding panel member May. The claim of racial discrimination was grounded upon an allegation of discriminatory discipline. The Fourth Circuit Court of Appeals correctly noted that "[t]here is no evidence in the record to support a prima facie case of discrimination" (Pet. App. 8- 9). Bare allegations of racial discrimination are not enough to survive a properly supported motion for summary judgment.

See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); General Building Contractors Assoc., Inc. v. Pennsylvania, 458 U.S. 375 (1982).

Conclusion

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ALBEMARLE COUNTY
SCHOOL BOARD, ET AL.
By Counsel

Douglas Leigh Guynn
Of Wharton, Aldhizer & Weaver
P. O. Box 809
100 South Mason Street
Harrisonburg, Virginia 22801
(703) 434-0316

George R. St. John
Of St. John, Bowling &
Lawrence
416 Park Street
Charlottesville, Virginia 22901
(804) 296-7138

Counsel Of Record

Certificate of Service

I certify that three copies of the foregoing Brief in Opposition was mailed first class, postage prepaid to J. Benjamin Dick, Esquire, 421 Park Street, Suite 2, Charlottesville, Virginia 22901, counsel for the Petitioner, this 7th day of June, 1988.

Of Counsel for Albemarle County School Board, et al.

No. 87-1875

IN THE

Supreme Court of the United States

October Term, 1987

OTIS L. LEE
Petitioner,
v.
THE ALBEMARLE COUNTY, VIRGINIA SCHOOL BOARD, et al.,
Respondents,

PETITIONER'S REPLY BRIEF

J. Benjamin Dick, Esquire*
Law Offices of J. Benjamin Dick
421 Park Street
Suite #2
Charlottesville, Virginia 22901

*Counsel of Record

Attorney for Petitioner

No. ____

IN THE

Supreme Court of the United States

October Term, 1987

OTIS L. LEE

Petitioner,

v.

THE ALBEMARLE COUNTY, VIRGINIA SCHOOL BOARD, et al.,

Respondents,

PETITIONER'S REPLY BRIEF

J. Benjamin Dick, Esquire*
Law Offices of J. Benjamin Dick
421 Park Street
Suite #2
Charlottesville, Virginia 22901

*Counsel of Record

Attorney for Petitioner

TABLE OF AUTHORITIES

REPLY BRIEF

Taking the complaint to be true as to allegations of bias, prejudice, malice, hysteria, hatred and claims of unequal treatment and discrimination in firing Mr. Lee, a tenured teacher with a continuing contract to allow a de novo trial in a district court, a disputed factual matter is a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict for the non-moving party". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). This Court has held in a §1983 action that the dismissal is not to be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, reh. den. 405 U.S. 948 (1972). Mr. Lee clearly met these tests.

In granting the motion to dismiss and summary judgment, pretrial depositions were never considered by the district court as being unnecessary. Mr. Lee proferred considerable evidence and an affidavit contradicting and disputing School Board evidence and findings as well providing evidence of a biased and tainted state procedural process and discrimination. (Appendix pages 41-43.)

It is the function of the trier of fact alone to evaluate contradictory evidence which Mr. Lee has been deprived of. Fireman's Fund Ins. v. Videfreeze Corp, 540 F.2d 1171, 1178 (3rd Circuit 1976), cert. denied, 429 U.S. 1053, 97 S.Ct. 767 (1977). Article I § 11 of the Virginia Constitution provides "That in controversies respecting property and in suits between man and man, trial by jury is preferable to any other and

ought to be held sacred." Below is one explicit example why Mr. Lee's right to trial should proceed.

For the first time in this elongated matter the School Board now identifies in its Brief in Opposition the teacher as one of two reasons for firing Mr. Lee, viz., that Mr. Lee "improperly hired and placed at least one teacher in his position as Chairman of the Special Task Force for Minority Hiring...". (Appendix, pg. 39). The state school authority names that "one teacher" by description whose hiring, and unfoundedly so, cost Mr. Lee his job, (Opposition Brief at Page 3), "by giving preferential hiring consideration to a minority applicant who clearly was unqualified for the job and who owed money to Lee." (Emphasis added.)

This hired teacher is Mr. Holmes.

Approved by the School Board on May 10, 1982 in a public hearing (Reply Brief Addendum A) recommended by Tom Hurlburt and not Mr. Lee, Personnel Director who first interviewed him rating him as a qualified math teacher, Mr. Holmes was hired. (Reply Brief Addendum B).[1] Mr. Holmes himself categorically denied under oath in the panel hearing as did Mr. Lee that Mr. Holmes owed Mr. Lee any money. (Reply Brief Addendum C).

This spurious allegation was made by one of the named Defendants in the moments of hysteria affecting Lee. Mr. W. T. Lewis, an assistant to the Superintendent of Schools, Vice Chairman of the Minority Task Force assigned later

---

[1] Mr. Holmes resigned and gave up his contract on learning of spurious charges from a School Board member that he was "incompetent" and a "homosexual" to avoid fighting an unfounded charge.

in the Lee apartment rental matter to investigate Mr. Lee internally, who had many professional and personal differences and jealousies against Mr. Lee that grew out of Mr. Lee's chairmanship of the Minority Task Force, brings the constitutional point home. The false allegation is a graphic example, along with the multiple tainted news articles of charges made public in the community (Appendix Pages 66-72) published by the Superintendent against Mr. Lee damaging his name before a panel hearing was ever emplaced that contributed to a biased and unfair deprivation of reputation and Lee's tenured contract.

Mr. Lee's Complaint alleges the same deprived him of fundamental substantive due process, viz., the blatant unfairness by such conduct in the taking of his property and liberty. The Holmes'

charge is typical evidence supporting Lee's claim of bias, capriciousness, arbitrariness, and malice promoted against him which are constitutionally impermissible in taking his job and good name.

The time spent (Opposition Brief Page 5) at the grievance panel hearing and the pages adduced are of no moment. It all could have consumed 180 days and a million pages. Yet such would never change the adverse, unfair, negative, hostile atmosphere culminating in local school authorities and officials such deep resentment that their adrenalin and steam rose to the level of a mob mentality. (Miss Garrison, Appendix page 43.) His basic fundamental constitutional rights under the Fourteenth Amendment and rights guaranteed by Congressional legislation can only be preserved by an adversary trial.

In the 3rd Circuit, summary judgment would have been denied. (See Matthew E. Jackson v. University of Pittsburgh, et al., 826 F.2d 230 (1987).) The 3rd Circuit reversed the granting of summary judgment, opinion by Judge A. Leon Higginbotham, who in that case gives the governing law on grants and denials of summary judgment. District courts, the 3rd Circuit holds, can not be the trier of contradicted and disputed facts creating genuine issues. They particularly point to considering the same on a claim of discrimination.

Mr. Lee gave an affidavit, uncontradicted in the district court record, (Appendix Page 53) that other school employees (all white) promoted real estate ventures among other businesses during school hours for years and none were ever so vilified or terminated in

the manner Lee had been for the same conduct. Mr. Lee had no notice as did anyone else that such outside activity would result in being fired muchless placed on probation.[2]

The School Board makes much ado about the number of blacks who it says testified against Mr. Lee. We submit this is totally an incorrect and self-serving statement. A number of black teachers did testify at the grievance panel stage but none testified adversely against Mr. Lee except the named Defendants who were all involved in one way or another conjuring up, monitoring, and speculating on Lee's motives to have helped a new young black teacher find affordable housing

---

[2] Superintendent Gutierrez testified in pre-trial deposition that over 65% of his work force held secondary jobs.

in a nice neighborhood, a practice Mr. Lee had done for many years and in this instance, on a non-school day.

Discrimination victims, as Judge Higginbotham wrote, often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs suffered. (Id. at Page 236.) Mr. Lee did more.

> That is one of the reasons why our legal system permits discrimination plaintiffs to 'prove their case by direct or circumstantial evidence.' (Citing United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 n.3, 108 S.Ct. 1478, 1481 n.3 (1983).

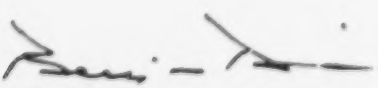
Finally, this is not a simple contract case. The taking involved state action under the colour of state law. Mr. Lee was deprived of a proprietary interest, a job he held for 23 years as well as his community reputation in the state process. It is clearly a 42 U.S.C. §1983

case having been deprived property and fundamental substantive rights in violation of the 14th Amendment. It is a 42 U.S.C. §1981 action having exacted upon him, a black citizen, pains, punishment, and penalties not exacted upon similarly situated white persons in the school system. The misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken under colour of state law. Monroe v. Pape, 365 U.S. 167 (1961).

CONCLUSION

Mr. Lee is entitled to a trial. His writ for certiorari should be granted or in the alternative, the cause remanded summarily on the briefs by this Honorable Court for trial.

OTIS L. LEE

BY: 

J. BENJAMIN DICK, COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Reply Brief was mailed first class, postage prepaid to Douglas L. Guynn, Esquire, P. O. Box 809, Harrisonburg, Virginia 22801 and George R. St. John, Esquire, 416 Park Street, Charlottesville, Virginia 22901, and J. Randolph Parker, Esquire, 1705 Seminole Trail, Charlottesville, Virginia 22901, this 27th day of June, 1988.

J. Benjamin Dick

J. BENJAMIN DICK, COUNSEL
FOR OTIS L. LEE

ADDENDUM

ADDENDUM "A"

AGENDA ITEM 82-5-4: Commendation of Task Force Committee for Minority Hiring and Recommendation for Election of Minority Professional Personnel

Dr. Gutierrez spoke about one of his goals concerning an increase in the number of minority professional personnel for Albemarle County Schools and the distribution of these personnel. He said for that purpose a Task Force Committee was created. He introduced Mr. Otis Lee, chairman of this committee, who, in turn, introduced members of the Task Force Committee for Minority Employment.

Mr. Lee then recommended that thirty four (34) minority applicants be employed by the Albemarle County Schools. (A copy of the list of applicants is attached to the minutes.)

There were questions by Board members about the number of vacancies for which these persons were employed.

Dr. Gutierrez suggested tabling the minority list until contracts were back in order that there might be the full support of the Board.

Mr. Strong MOVED that the twenty five (25) people who had received the No. 1 letter from the Task Force (in lieu of contract) be elected, and that the remaining nine (9) applicants be placed on a reserve list for possible employment should vacancies occur. The motion was seconded by Dr. Tolbert. On a roll call vote, all Board members with the exception of Mr. Feggans voted for the motion. The motion was APPROVED BY A VOTE OF 6 to 1.

COUNTY OF ALBEMARLE

Plaintiff's Exhibit #19

Department of Education

ROOM 310, COUNTY OFFICE BUILDING
CHARLOTTESVILLE, VIRGINIA 22901

OFFICE OF SUPERINTENDENT

May 10, 1982

The Chairman of the Minority Task Force recommends to the Division Superintendent, Dr. Carlos Gutierrez, the following names for election of employees:

✓1.	Alston, Dianne H.	Elementary
2.	Alston, Monique	Middle
✓3.	Asbury, Cynthia A.	Elementary 1-3
✓4.	Coston, Annie	Middle & Secondary
5.	Douglas, Jacqueline	Elementary
✓6.	Ford, John	Physical Education, Science
✓7.	Ford, Sharon	Special Education (Elementary)
8.	Freeman, William	Elementary K-3
9.	Frink, Keeda B.	Business - Middle
✓10.	Fryar, Dian	Middle School
✓11.	Glenn, Patrice	Special Education 1-2
✓12.	Gibson, Kim	Elementary K-3 (2)
✓13.	Harding, Bettie	Math (Middle & Secondary)
14.	Harris, Donna	Physical Education
✓15.	Hicks, Clarence	Elementary
✓16.	Hicks, Deborah	Secondary English
✓17.	Holmes, William	Math
✓18.	Jenkins, James L.	Elementary Music
19.	Jones, Catherin F.	Elementary K-3
✓20.	Lofton, Angela	Elementary K
21.	Magruder, Jesse W.	Elementary
22.	Marshall, Leverne L.	Elementary K-4
✓23.	McEachern, Willie F.	Middle 7-8
24.	McGrady, Diane	Elementary 1
✓25.	McLaurin, Willie Mae	Secondary
✓26.	Moore, Angelia	Middle (Math)
✓27.	Pugh, Kenneth D.	Elementary
✓28.	Rich, William F.	Alternative Education
✓29.	Robinson, Steve A.	Physical Education
30.	Smith, Kathleen V.	K-3
31.	Spivey, Jonathan Fletcher	K-12 Music
✓32.	Stevenson, Denise	K-3
33.	Von Wright, Margaret A.	Secondary
✓34.	Williamson, Bettie J.	Elementary K

Otis L. Lee, Chairman

1952

82-5-L

ADDENDUM "B"

EXAMINATION OF THOMAS HURLBURT, PERSONNEL DIRECTOR, FEBRUARY 10, 1983

Q. With reference to an individual named William T. Holmes, are you familiar with that candidate's filed?

A. Yes.

Q. Would you feel that he would be a viable candidate for a teaching position based upon his file?

A. I assume you have looked in his file and I assume therefore you have seen in my handwriting a statement that says essentially I would not offer Mr. Holmes an administrative position because that's what Mr. Holmes was looking for; but I might very well consider him for a teaching position. I think that's about the way it was stated. I haven't looked at that gentleman's file since a year ago or so; but basically I think I had a statement to that effect in there. (Emphasis added.)

Q. And upon what did you base that statement?

A. Upon his teaching record and his background and an interview or two that I had with him. I think I met Mr. Holmes on a couple of occasions when he was seeking jobs years ago. I think Mr. Holmes had experienced some difficulties in another school system as an administrator but those difficulties had not related back into the teaching areas apparently.

TEACHER APPLICANT INTERVIEW REPORT

Name Holmes, William J. Date 6/26/79

MANNER:	Ill-at-ease	0 — 50 — ✓ — 100	Poised
DISPOSITION:	Reserved	— ✓ —	Aggressive
PERSONALITY	Weak	— ✓ —	Vibrant
ENTHUSIASM:	Withdrawn	— ✓ —	Evident
SENSE OF HUMOR:	Not Apparent	— ✓ —	Apparent
APPEARANCE:	Unattractive	— ✓ —	Attractive

GENERAL IMPRESSION: Poor — 0 — 50 — ✓ — 100 — Superior

Grade or Subject Preference: Elementary administrator or teacher

Certification: Holds PGP in Elem 4-7, Mathematics.

Remarks: Mr. Holmes has 25 years of experience in Orange county as teacher, elementary school administrator, assistant secondary administrator, and home-school coordinator. He was recently fired from his position in Orange. We discussed this situation openly. I suggested that the Albemarle County School Board would certainly not hire him as an administrator so close to Orange but might consider him as a teacher. I indicated that he might do better for an administrative position further away from his bad press. I told him I would consider him for a teaching position. He will have references sent

Interviewer: Thomas W. Hulbert

Will marry Divorced on or about

Husband or wife to work at

Approximate number of years expected to be in this area

(Over)

ADDENDUM "C"

DIRECT EXAMINATION OF W. T. HOLMES
JANUARY 31, 1983

By: Mr. Atkins

Q. Would you state your full name please?

A. My name is William T. Holmes.

Q. Where do you reside, Mr. Holmes?

A. Orange County, Virginia.

Q. You are also known as W. T. Holmes?

A. Yes.

Q. Mr. Holmes, did you in April of 1982, or do you now owe Mr. Otis Lee any money?

A. No I do not.

Q. Thank you. Answer Mr. Bowling's questions.

CROSS EXAMINATION

By: Mr. Bowling

Q. Have you ever owed Mr. Lee any money?

A. No I have not.

Q. Never?

A. Never.

Q. Have you ever had any business dealings with him?

A. No, none whatsoever.

Q. What relationship have you had with Mr. Lee?

A. Well, he and I have been administrators in this district, that's how I met him really.

Q. Have you had any personal relationships?

A. No, nothing personal.